CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 214

MRS. ABA BADGER SUTTLE, WIDOW OF JOHN G. SUTTLE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN G. SUTTLE, DECEASED, ETC., PETITIONER,

vs.

REICH BROS. CONSTRUCTION CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 11849.

MRS. ABA BADGER, widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, deceased, etc.,

Appellant,

versus

REICH BROS. CONSTRUCTION COMPANY, ET AL.,

Appellee.

DESIGNATION OF APPELLANTS AS TO THE PRINTING OF THE RECORD.

Filed Dec. 9, 1946.

To the Clerk of the United States Circuit Court of Appeals, Fifth Circuit:

Appellant designates that the following portion of the transcript of record in the above entitled and numbered cause be omitted from the printed record, to-wit:

Page 8—Notice of hearing of motion to dismiss.

Pages 11-12-13-14 and down to the prayer of the motion for a new trial on page 15; said omitted pages containing only the argument and authorities cited by the plaintiff in support of the motion for new trial, as required by the rules of the District Court.

Page 16—Statement of counsel for plaintiff as to oral argument on the motion for new trial.

Appellant designates that all of the balance of the record brought up on appeal be printed.

JOHN D. MILLER,
Counsel for Appellant.

We consent to the printing of record on appeal as outlined in the above designation.

J. T. OWEN,
Counsel for Appellee.

United States of America.

District Court of the United States, Eastern District of Louisiana, Baton Rouge Division.

No. 387 (Civil Action).

Mrs. Aba Badger, Widow of John G. Suttle, Individually and for her minor child, Sylvia Suttle,

versus

Reich Bros. Construction Co., Cleve E. Reich, Montie C. Reich and Highway Insurance Underwriters.

Appearances:

Messrs. Miller & Block, (John D. Miller, Esq.),
Messrs. Engle, Laub, Adams & Forman,
Natchez, Mississippi,
Messrs. Blair & Anderson,
Tupelo, Mississippi,
Attorneys for Plaintiffs-Appellants.

Messrs. Porteous & Johnson (F. Carter Johnson, Jr., Esq.),
Messrs. Jones, Kimball & Owen (Allen Kimball, Esq.),
P. O. Box 1322, Lake Charles, La.,
Messrs. Durrett & Hardin (Calvin E. Hardin, Jr., Esq.),
La. Natl. Bk. Bldg., Baton Rouge, La.,
Attorneys for Defendants-Appellees.

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 20th day of November, 1946, at the City of New Orleans, Louisiana.

TRANSCRIPT OF RECORD.

COMPLAINT.

Filed August 2nd, 1946.

(Number and Title Omitted.)

Mrs. Aba Badger, widow of John G. Suttle, a resident of the County of Lee, and State of Mississippi, and a citizen of said State, Plaintiff, complains of Reich Bros. Construction Co., a commercial partnership domiciled in the City of Jennings, Louisiana, and composed of Cleve E. Reich and Montie C. Reich, and the said partners both of full age and residents of said City of Jennings, and citizens of the State of Louisiana, and of Highway Insurance Underwriters, public liability insurer of said above named parties, a corporation organized and existing under the laws of the State of Texas and domiciled in the City of Austin in said State, duly licensed to transact business in Louisiana with an Agent for service of process in the City of Baton Rouge in this District, and shows that this is a suit of a civil nature, wholly between citizens of different States, and involves in each of its parts sums in excess of Three Thousand & No/100 ($3,000.00) Dollars.

First Count.

I.

Plaintiff, as the surviving widow of John G. Suttle, and as the duly appointed guardian of Sylvia Suttle, minor daughter of her marriage with John G. Suttle, deceased, appointed as such guardian by the Chancery Court of Lee County, Mississippi, in which County said minor resides, shows that on or about December 10, 1945, a large truck and trailer, the property of said Reich Bros. Construction Co., at or about 6:30 P. M., was being negligently driven and negligently operated on U. S. Highway No. 190, at or near the town of Goodbee, in St. Tammany Parish, Louisiana, in an Easterly direction, when it collided with an automobile being driven at the same place in a Westerly direction by plaintiff's late husband, John G. Suttle, killing plaintiff's said husband and their daughter, Adair Dorothy Suttle, and completely wrecking the Chevrolet sedan, the property of plaintiff's said husband in which at the time plaintiff, her said husband, and her said two daughters were riding;

II.

That the said truck and trailer at the time were being driven and operated by an employee and servant of said Reich Bros. Construction Co., in and about the business of said company and by said agent and servant within the scope of his authority; and the said servant and employee of defendants and the defendants were all guilty of negligence in the manner in which said trailer was loaded with a dragline which was allowed to extend beyond the width of the trailer, which is of the maximum width allowed by law, to-wit; eight (8') feet;

and it was negligence on the part of all of said parties to operate said truck and trailer in the manner and under the circumstances herein stated with deficient lights and otherwise as stated herein, and at the time and place of said collision;

III.

That the negligence of defendants, their servants and employees, was the proximate cause of said accident and collision herein set forth, and among other acts of negligence, the said defendants and their servants and employees were guilty of the following acts of negligence:

That the trailer attached to the said truck was loaded with large heavy machinery, having a total width of approximately twelve (12') feet, and was driving on a road only twenty (20') feet wide, so that it extended past the middle of the said road; that the said trailer was not lighted at the sides and the truck was not lighted as required by the laws and regulations of the State of Louisiana; that the said oversize truck and trailer was being driven on the said Highway pursuant to a permit issued by the State Highway Police of Louisiana, which permit expired at sunset on said day; that the night was dark and overcast; that plaintiff's said husband was driving carefully on his right side of the road and it was impossible for him to see the extension of the said heavy trailer and machinery on his side of the road; that the overhanging machinery struck the left front side of the said Chevrolet car, tearing it open along the left side thereof, causing the death of plaintiff's said husband and of the said Adair Dorothy Suttle, and completely demolishing the said car, and seriously injuring plaintiff and her said minor daughter, Sylvia;

Also, in that the driver of said truck and trailer saw, or could be the exercise of diligence and by keeping a proper lookout, have seen the car driven by the said John G. Suttle, deceased, appoaching, the Highway at said point of collision being straight for several hundred yards each way, and the car so driven having proper lights and being driven at the time on its proper side of the highway, and the driver of said truck and trailer well knowing the facts and circumstances hereinabove alleged, and particularly well knowing that the trailer with the machinery thereon extended beyond the sides of the trailer and the fact of the improper and insufficient lighting of said trailer on the sides, and other facts hereinbefore alleged, and the further fact that the driver of the oncoming car, because of darkness and the insufficient and improper lighting of the truck and trailer, could not know that the load on the trailer extended beyond the sides and width of the trailer and the width of the truck, should in the exercise of reasonable care and caution have pulled his truck over to his right side, partly on the shoulder of said road, a sufficient distance to allow the oncoming car to pass the trailer after it had safely passed the cab of the truck and the body of the truck; but instead, the driver of said truck, with full knowledge of the facts and circumstances as herein averred, did not allow sufficient clearance space, all of the circumstances and facts considered thereby proximately causing the said collision and damage, as hereinabove averred;

That the said automobile of plaintiff's husband stopped almost immediately after said collision, but defendants' truck was not brought to a stop for almost one thousand feet.

IV.

Plaintiff claims for herself and for her minor daughter, Sylvia, damages for the death of their said husband and father, including loss of consortium, companionship and support, in the sum of Forty Thousand & No/100 ($40,000.00) Dollars of each defendant in solido, and as Administratrix of the Estate of John G. Suttle, duly appointed as such by the Chancery Court of Lee County, Mississippi, plaintiff claims damages as follows:

Damages to the said Chevrolet automobile.....	$1,000.00
Funeral expenses for John G. Suttle, Dec'd.....	315.00

Second Count.

V.

Plaintiff renews and reiterates each and every allegation as to the accident as set out in the First Count of this Complaint, and shows that she claims damages from each of the said defendants in solido for the death of her daughter, Adair Dorothy Suttle, in the sum of Forty Thousand & No/100 ($40,000.00) Dollars, and for the funeral expenses of her said daughter, the sum of Three Hundred Fifteen & 10/100 ($315.10) Dollars.

Third Count.

VI.

Plaintiff shows that she was severely injured in the accident described in the First Count of this Complaint, the allegations whereof are adopted and renewed herein; that she was rendered unconscious and suffered severe shock, pains and injuries, that she received numerous lacerations

and contusions and dislocation of the occyntal bones, from which injuries she is still suffering; that she claims of each of the defendants herein in solido the sum of Five Thousand & No/100 ($5,000.00) Dollars for injuries, pain, shock and disfigurement of the head, and One Thousand & No/100 ($1,000.00) Dollars for medical, hospital and ambulance expenses.

Fourth Count.

VII.

As the Mother and Guardian of her said minor child, Sylvia Suttle, for and on behalf of the said minor, plaintiff reiterates and renews the allegations of fact set out in the First Count hereof, and shows that in the said accident and the said minor suffered serious injuries, pain and shock; that she was knocked unconscious, and received serious contusions and lacerations of the scalp, forehead, face and chest, with severe and painful contusions of her body and extremities, for which she claims damages from each of the said defendants in solido in the sum of Five Thousand & No/100 ($5,000.00) Dollars, and One Thousand & No/100 ($1,000.00) Dollars for medical, surgical, hospital and ambulance expenses.

General Statement.

Plaintiff shows that the defendant, Highway Insurance Underwriters, had been authorized to transact a casualty business in the State of Louisiana and had issued its policy in favor of said defendant, Reich Bros. Construction Co., insuring said partnership against liability for personal injury, including death, and property damages, in connection with the operation of said truck and trailer, which policy

was in force and effect at the time of the accident described in the First Count of this Complaint.

Wherefore, she prays for summons and service upon each of the said defendants, and for judgment against each of them in solido for Ninety-Four Thousand, Six Hundred Thirty & 20/100 Dollars ($94,630.20), in the capacities and for the purposes in the foregoing Complaint set out, with interest at five (5%) percent per annum from December 10, 1945, until paid.

For costs, and for such relief as she may be entitled to receive.

(Sgd.) ENGLE, LAUB, ADAMS & FORMAN,

Natchez, Miss.

(Sgd.) BLAIR & ANDERSON,

Tupelo, Miss.

(Sgd.) MILLER & BLOCH,
(Sgd.) JOHN D. MILLER,

1014 Whitney Bldg.,
New Orleans, La.

Attorneys for Plaintiff.

MOTION TO DISMISS ON BEHALF OF REICH BROS. CONSTRUCTION CO., CLEVE E. REICH AND MONTIE C. REICH.

7 Filed August 26th, 1946.)

(Number and Title Omitted.)

Reich Bros. Construction Co., a commercial partnership composed of Cleve E. Reich and Montie C. Reich, and

Cleve E. Reich and Montie C. Reich, individually, made parties defendant herein, move the Court as follows:

1. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this Court is invoked solely on the ground of diversity of citizenship, and (b) the movers herein are domiciled and inhabitants of the Western District of the District Court of the United States, State of Louisiana, Lake Charles Division.

(Sgd.) J. T. OWEN,
Of JONES, KIMBALL & OWEN,
Attorneys for Movers.

Address: Lake Charles, La.

8 Notice of Hearing on Motion to Dismiss, omitted from the printed record, pursuant to Designation of Appellant as to Printing Record, copied at page 1.

* * * * * * * * *

9 MINUTE ENTRY.

October 3rd, 1946.

Caillouet, J.:

Hearing on Motion of Reich Bros. Construction Company Cleve E. Reich and Montie C. Reich and Order Granting Same.

(Number and Title Omitted.)

This cause came on this day to be heard on defendants' motion to dismiss;

Present:

Allan Kimball, Esq.,
William Porteous, Esq.,
C. E. Hardin, Esq.,
Attorneys for Defendants;
B. R. Forman, Jr., Esq.,
John D. Miller, Esq.,
Attorneys for Plaintiff.

Whereupon, after hearing argument of counsel for the respective parties;

It is Ordered that the motions of Reich Bros. Construction Co., Cleve E. Reich, Montie C. Reich to dismiss, be and the same are hereby granted, and that the suit is hereby dismissed, as to them.

It is Further Ordered that the motion of Highway Insurance Underwriters to dismiss, be, and the same is hereby, denied.

PLAINTIFF'S MOTION FOR NEW TRIAL.

Filed October 10th, 1946.

(Number and Title Omitted.)

Now into Court, through their undersigned attorneys, comes the plaintiff herein, Mrs. Aba Badger Suttle, individually and as guardian of the minor, Sylvia Suttle, and as administratrix of the Estate of John G. Suttle, deceased, and moves the Court to set aside the judgment dismissing this action as to the defendants, Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich, entry of which was directed by the Court as the hearing in Baton Rouge on October 3, 1946, and grant a new trial on said defendants' motion to dismiss this suit, on the ground that said judgment was contrary to law and prejudicial to plaintiff. Plaintiff specifies as ground for praying for such new trial the following:

(1) The formula adopted and applied by the Court, that a corporation can have but one domicile or residence, in this instance, the State of Texas, and being a non-resident of Louisiana the waiver of the corporate defendant to service of process in the Eastern District of Louisiana could not affect the partnership and individual defendants who reside in the Western District of the State, and that such defendants were right in objecting to the venue in this District as to them, is not the law as applied by the Federal Courts in several cases cited in plaintiff's brief, which cases were not referred to or, apparently, considered by the Court.

(2) Whether or not a corporation is a resident within a State or District is a matter of State law, binding upon the Federal Courts, there being no statute of the United

States governing such matter; and, in Louisiana, a foreign corporation which has complied with the requisites for domesticating itself here, it for jurisdictional and all other purposes a resident of the District in which it has appointed an Agent for the service of process, and is not a non-resident.

11 Argument and Authorities cited by Plaintiff in support of the Motion for New Trial, omitted from the Printed Record, pursuant to Designation of Appellant as to Printing Record, copied at page 1.

* * * * * * * * *

Wherefore, plaintiff respectfully prays that this motion for a new trial be granted and that the judgment dismissing this action as to the defendants, Reich Bros. and the partners of that firm, be recalled, annulled and set aside and they required to answer; plaintiff prays for a hearing on this motion at the next motion day in the Baton Rouge Division, or at such other time as this Honorable Court may be pleased to fix;

And for such other and further relief as in law and justice it may be entitled to receive.

(Sgd.) JOHN D. MILLER,
1014 Whitney Bldg.,
New Orleans, La.

(Sgd.) ENGLE, LAUB, ADAMS & FORMAN,
Natchez, Miss.

(Sgd.) BLAIR & ANDERSON,
Tupelo, Miss.

Attorneys for Plaintiff.

A copy of the foregoing motion for a new trial has been served on attorneys of record for Reich Bros. Construction Co. and the individual partners of said firm.

New Orleans, October 10th, 1946.

(Sgd.) JOHN D. MILLER,
Of Counsel.

16 Statement of Counsel for Plaintiff as to Oral Argument on the Motion for New Trial, omitted from the Printed Record, pursuant to Designation of Counsel as to Printing Record, copied at page 1.

* * * * * * * * *

MINUTE ENTRY.

November 12th, 1946.

Caillouet, J.:

Hearing on Plaintiff's Motion for New Trial and Order Denying Same.

(Number and Title Omitted.)

This cause came on to be heard on the motion of plaintiffs for a new trial from the judgment dismissing this action as to the defendants Reich Bros. Construction Co., Cleve Reich and Montie C. Reich, three of the defendants herein:

Present:

Calvin E. Hardin, Esq., Attorney for Highway Insurance Underwriters;

Plaintiffs, absent and unrepresented by counsel;

Calvin E. Hardin, Jr., counsel for Highway Insurance Underwriters, announced to the Court that he had no statement to make.

Whereupon, the Court concluded that, as counsel for the movers had, in effect, submitted the matter for determination, by his written signed appearance filed in the record, said motion for a new trial was properly before it for final disposition, and upon due consideration thereof, did, then and there, deny the same.

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18 NOTICE OF APPEAL.

Filed November 20, 1946.

(Number and Title Omitted.)

Notice is hereby given that Mrs. Aba Badger, widow of John G. Suttle, individually and as administratrix of the Estate of John G. Suttle, deceased, and as guardian of the minor, Sylvia Suttle, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the decree or order dismissing this suit as to the defendants, Reich Bros. Construction Company, Cleve E. Reich and Montie C. Reich, entered in this action on October 3, 1946, in respect to which a new trial was refused on the 12th day of November, 1946.

November 20, 1946.

(Sgd.) MILLER & BLOCH,
(Sgd.) JOHN D. MILLER,

1014 Whitney Bldg.,
New Orleans, La.

(Sgd.) ENGLE, LAUB, ADAMS & FORMAN,

Natchez, Miss.

(Sgd.) BLAIR & ANDERSON,

Tupelo, Miss.

19 APPEAL BOND.

(Filed November 20, 1946.)

(Number and Title Omitted.)

Know All Men By These Presents that we, Mrs. Aba Badger, widow of John G. Suttle, Individually, and as administratrix of the Estate of John Suttle, deceased, and as guardian of the minor, Sylvia Suttle, as Principal, and National Surety Corporation of New York as Surety, are held and firmly bound unto Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich in the full and just sum of Two Hundred Fifty & No/100 ($250.00) Dollars, to be paid to the said Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich, their successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed and dated this the 20th day of November, 1946.

Whereas, on the 3rd day of October, 1946, in an action pending in the District Court of the United States for the Eastern District of Louisiana, Baton Rouge Division, between the above named principal as plaintiff and the above named obligees, as defendants, et als., an order was rendered against the said plaintiff, dismissing said cause as to the said named defendants, and the said plaintiff having filed a notice of appeal from such order to the Circuit Court of Appeals for the Fifth Circuit;

Now, the condition of this obligation is such, that if the said plaintiff shall prosecute her appeal to effect and shall pay costs if the appeal is dismissed or the said order

affirmed, or such costs as the said Circuit Court of Appeals may award against the said plaintiff if the said order is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

(Sgd.) MRS. ABA BADGER SUTTLE,
By (Sgd.) JOHN D. MILLER, Atty.

NATIONAL SURETY CORPORATION, NEW YORK, N. Y.,
By (Sgd.) AUGUSTE COIRON,
Atty. in Fact.

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20 DESIGNATION OF CONTENTS.

Filed November 21, 1946.

(Number and Title Omitted.)

To the Hon. Dallam A. O'Brien, Jr., Clerk:

In preparing the transcript in this matter for the Circuit Court of Appeals please include the following documents:

1. The complaint;

2. The motion to dismiss filed on behalf of Reich Bros. Construction Co., Cleve E. Reich and Montie C. Reich.

3. The order dismissing this case as to the defendants named in No. 2 above, entered on October 3, 1946;

4. Plaintiff's motion for a new trial of said order;

5. The order over-ruling the said motion for a new trial, entered November 12, 1946;

6. Plaintiff's notice of appeal, filed November 20, 1946;

7. The appeal bond filed by plaintiff November 20, 1946;

Being the entire record between appellant and appellees.

November 20, 1946.

(Sgd.) JOHN D. MILLER,
(John D. Miller),
Of Counsel for Plaintiff.

1014 Whitney Building,
New Orleans, La.

Copy of the foregoing designation of the record has been served on the Attorneys of record for the appellees named therein.

(Sgd.) JOHN D. MILLER,
Of Counsel.

Clerk's Office.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 20 pages contain and form a full, true and complete transcript of the record in the case entitled "Mrs. Aba Badger, Widow of John G. Suttle, Individually and for her minor child, Sylvia Suttle, versus Reich Bros. Construction Co., Cleve E. Reich, Montie C. Reich, and Highway Insurance Underwriters," No. 387 of the Civil Action Docket of this Court, Baton Rouge Division, as made up in accordance with the Designation of Contents copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, La., this 3rd day of December, A. D. 1946.

A. DALLAM O'BRIEN, JR.,
Clerk,
By ANDREW J. BACON,
Deputy Clerk.

(Seal)

[fol. 20] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of April 16th, 1947

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc.,

versus

REICH BROS. CONSTRUCTION CO., et al.

On this day this cause was called, and, after argument by John D. Miller, Esq., and C. F. Engle, Esq., for appellant, and George T. Owen, Jr., Esq., for appellees, was submitted to the Court.

[fol. 21] OPINION OF THE COURT—Filed April 30, 1947

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc., Appellant

versus

REICH BROS. CONSTRUCTION CO., et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Louisiana

April 30, 1947

Before Hutcheson, McCord, and Waller, Circuit Judges

WALLER, Circuit Judge:

The question involved is whether, under Section 113 of [fol. 22] Title 28, U. S. C.,[1] the venue was properly laid in

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[1] "When a state contains more than one district, every suit not of a local nature, in the district court thereof,

the Eastern District of Louisiana, where the suit was brought.

The defendant, Highway Insurance Underwriters, is a corporation under the laws of Texas, domiciled, according to its charter, in Austin, but in qualifying to do business in Louisiana it complied with the Louisiana statutes and appointed a resident agent in the Eastern District of Louisiana for the service of process upon it. The other defendants are all non corporate and reside in the Western District of Louisiana.

Jurisdiction of the Federal Court in the Western District of Louisiana is conceded, but all of the defendants except the Texas corporation say that since no defendant resides in the Eastern District, the suit cannot, in the face of their objections, be maintained in the Eastern District. The plaintiff—the Appellant here—counters with the response that the Texas corporation, under the decision in *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U. S. 165, should be held to have waived the right to be sued at its corporative domicile and by reason thereof it became suable in the Eastern District to the same extent as would a resident of that District. To all intents and purposes, the plaintiff says, the corporation is a resident of the Eastern District of Louisiana to the same extent as a domestic corporation domiciled in that District. In collateral support of this contention Appellant cites state statutes [2] and decisions holding that foreign corporations that have [fol. 23] appointed resident agents under the statute become domesticated to the extent that they should be con-

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against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides." Sec. 113, Title 28, U. S. C.

[2] Act 267 of 1914, as amended by Act 120 of 1920; Article 240, Louisiana Code of Practice.

sidered as domestic corporations, which, for instance, are not subject to attachment as non-residents.[3]

Appellees' answer to this is that Appellant cannot augment or diminish the Federal statutes of jurisdiction and venue by invoking state statutes and state decisions.

The lower Court dismissed the suit as to the defendants residing in the Western District, but allowed the case to stand as to the Texas corporation. From this judgment the plaintiff appealed.

The lower Court did what should have been done.[4] The question must be decided under Federal law for it is apparent that if a foreign corporation which had qualified under the state statutes to do business in Louisiana were held to be an inhabitant, resident, or citizen of Louisiana to the same extent as a domestic corporation, then no citizen of Louisiana could sue such a foreign corporation in the Federal Courts of that state, nor could such a case be removed to the Federal Court. The impact of such a holding on the jurisdiction of the Federal Courts would be so devastating that if such a result is to be achieved it must come through Congressional legislation rather than through state statutes and decisions thereon.

[fol. 24] That a corporation is a resident within the Federal statutes of jurisdiction and venue only at the place where it is located under its charter is too well settled and too sound in the law to be doubted now. In *Ex Parte Schollenberger*, 96 U. S. 369, rendered in 1877, the Court said:

> "States cannot by their legislation confer jurisdiction upon the courts of the United States, neither can consent of parties give jurisdiction when the facts do not; but both State legislation and consent of parties may bring about a state of facts which will authorize

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[3] *Burgin Bros. v. Barker Baking Co.*, 152 La. 1075, 95 So. 227; *Fullilove v. Central State Bank*, 160 La. 831, 107 So. 590; *Palmer v. Avalon Oil Co.*, 10 La. App. 512, 120 So. 781.

[4] *Murphree v. Mississippi Publishing Corporation*, 149 F. 2d. 138.

the courts of the United States to take cognizance of a case."

* * * * * * *

"A corporation cannot change its residence or its citizenship. It can have its legal home at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws."

See also *Fairbanks Shovel Company v. Wills*, 240 U. S. 642; *Gorman v. A. B. Leech and Company*, 11 F. 2d 454; *Creagar v. P. F. Collier & Son*, 36 F. 2d 781.

It is settled by the *Neirbo* case that the defendant corporation has waived the right to insist upon being sued at its domicile by its acceptance of the Louisiana statute so that it may be sued in either district of Louisiana, but such waiver cannot bind the individual co-defendants in this case. It is this implied waiver that allows the [fol. 25] corporate defendant to be sued in the Eastern District of Louisiana in the absence of residence therein by any one of the other defendants.

The jurisdiction of the Federal District Courts is limited. It is entirely statutory and must always be made clearly to appear. For the same reason the venue cannot be other than that prescribed by the statute unless the provisions of the statute are waived.

Since the corporate defendant was neither a resident nor an inhabitant of the Eastern District of Louisiana, and since its implied waiver was not a valid waiver on behalf of its co-defendants, it follows that the judgment of the Court below should be

Affirmed.

[fol. 26] JUDGMENT

Extract from the Minutes of April 30th, 1947

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc.,

versus

REICH BROS. CONSTRUCTION CO., et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Mrs. Aba Badger, widow of John G. Suttle, individually and as administratrix of the estate of John G. Suttle, deceased, etc., and the surety on the appeal bond herein, National Surety Corporation of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

PETITION FOR REHEARING—Filed May 21, 1947

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 11,849

MRS. ABA BADGER, widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, deceased, etc.,
Appellant,

versus

REICH BROS. CONSTRUCTION CO., ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

PETITION FOR REHEARING BY APPELLANT.

May It Please the Court:

Appellant herein respectfully petitions this Honorable Court to grant unto her a rehearing of the case herein, and a resubmission of the points at issue and the principles of law that should govern, and for cause, with utmost deference and respect, represents to the Court that in the opinion and judgment rendered herein on April 30th, 1947, this Honorable Court upon a misunder-

standing, as we sincerely believe, of the position and contention of Appellant and upon a misunderstanding of the issues and principles of law presented, erred in law in the following respects, to-wit:

POINT 1

The Court erred in holding that the jurisdiction of the Federal Courts was an issue involved in the case herein, and in holding that the jurisdiction of the Federal Courts would be affected by the issue of law on the question of venue presented by this case.

POINT 2

The Court erred in holding as a matter of law that the terms "inhabitant", "resident" and "citizen" as used in the Federal venue and jurisdiction statutes are identical with the term "citizen" as used in the jurisdiction statutes of the Federal Courts.

POINT 3

The Court e.. in holding that residence as required by Federal venue statutes is a status determined by Federal law, rather than by State law.

POINT 4

The Court erred in overlooking or not considering the facts that by doing business with the Corporation in Louisiana the Partnership Appellees consented to be sued in any district in which jurisdiction was proper as to the Corporation.

POINT 5

The Court erred in holding in effect that the Federal venue statutes are subject to as strict an inter-

pretation as the Federal jurisdiction statutes, and further erred in disregarding the present tendency of the Federal Courts toward a more liberal interpretation of the Federal venue statutes.

POINT 6

The Court erred in holding, in effect, that it was beyond the power and authority of the State of Louisiana to pass a law conferring "residence" on foreign corporations meeting the conditions established by the State.

POINT 7

The Court erred in the *obiter dictum* to the effect that a foreign corporation which acquired "residence" in Louisiana could not be sued by a Louisiana Citizen in a federal court. This would not be true of an individual citizen of another state who had acquired "residence" in Louisiana and is not true as to such a corporation.

We most respectfully urge the Court that in the interest of justice, and because of the far reaching effect of the decision of this Honorable Court on the question of Federal venue, that the Appellants are entitled to a rehearing.

Respectfully submitted,

ENGLE, LAUB,
ADAMS & FORMAN,
MILLER & BLOCH,
CHAS. F. ENGLE,
JOHN D. MILLER,
Attorneys for Petitioner.

[fol. 30] ORDER DENYING REHEARING

Extract from the Minutes of May 31st, 1947

No. 11849

MRS. ABA BADGER, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc.,

versus

REICH BROS. CONSTRUCTION CO., et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

October Term, 1947.

No. 2

MRS. ABA BADGER SUTTLE, Widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, Deceased, Etc.,
Petitioner,

versus

REICH BROS. CONSTRUCTION CO. ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

JOHN D. MILLER,
HENRY G. BLOCH,
JOHN R. ANDERSON,
W. A. BLAIR,
C. F. ENGLE,
S. B. LAUB,
R. BRENT FORMAN,
LAWRENCE ADAMS,
Attorneys for Petitioner.

Of Counsel for Petitioner.

HAUSER PRINTING CO., INC.

IN THE

Supreme Court of the United States

October Term, 1947.

No.

MRS. ABA BADGER SUTTLE, Widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, Deceased, Etc.,

Petitioner,

versus

REICH BROS. CONSTRUCTION CO. ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

May It Please the Court:

Mrs. Aba Badger Suttle respectfully presents this, her Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, together with Brief in Support of Petition to the Honorable Circuit Court of Appeals of the United States for the 5th Cir- Circuit at New Orleans, La., in the case of Mrs. Aba Badger Suttle, widow of John G. Suttle, individually and as Administratrix of the Estate of John G. Suttle, deceased, etc., versus Reich Bros. Construction Company et al, #11849, heretofore decided by the said Honorable 5th Circuit Court of Appeals on April 30, 1947, and in which Appellant's Motion for Rehearing was overruled without a written opinion, May 31, 1947, and respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED

Mrs. Aba Badger Suttle, widow of John G. Suttle, individually and as Administratrix of the Estate of John G. Suttle, deceased, etc., a citizen and resident of the State of Mississippi brought this suit in Federal District Court of the Eastern District of Louisiana, against Reich Bros. Construction Company and the individual members thereof, citizens of Louisiana and residents of the Western District of Louisiana, and the insurer of Reich Bros. Construction Company, the Highway Insurance Underwriters, a Texas corporation, authorized and qualified to do business in Louisiana, whose agent for service of process resides in the Eastern District of La., seeking judgment for alleged death, personal injury and property damage resulting from an automobile accident, which occurred on December 10, 1945, in the Eastern District of Louisiana. The Reich Bros. Construction Company and the individual members thereof and also the Highway Insurance Underwriters filed Motions to Dismiss the Plaintiff's complaint on the grounds of improper venue. Upon the hearing of said Motions, the U. S. District Court dismissed the motion of the Highway Insurance Underwriters, holding that, under the Consent Doctrine established in the case of *Neirbo Co. vs. Bethlehem Ship-building Corporation*, 308 U.S. 165; 60 Supreme Court 153; 84 Lawyers' Edition 167; the Highway Insurance Underwriters was properly brought into Court in the Eastern District of Louisiana and might equally as well have been brought into Court in the Western District of Louisiana. But the District Court upheld the Motion of the Reich Bros. Construction Company and the individual members thereof, and dismissed the Plaintiff's suit as to them, holding that these Defendants had a right to insist on being sued in the

district of their residence unless their co-defendant was a resident of the other district of the State and that the co-defendant, the Highway Insurance Underwriters was not a resident of the other district of the State; therefore, that the Reich Bros. Construction Company and the individual members thereof could be sued only in the district of their residence. An appeal was taken from this judgment to the U. S. Circuit Court of Appeals for the 5th Circuit and the said Circuit Court of Appeals affirmed said judgment, in an opinion reported in 161 F. 2d. 289, holding that the Highway Insurance Underwriters was not a resident of the Eastern District of Louisiana and, therefore, that the Reich Bros. Construction Company and the individual members thereof had a right to object to being sued outside of the district of their residence.

Petitioners then presented a Petition for Rehearing to the Circuit Court of Appeals. Same was denied without written opinion.

Petitioner therefore presents this, her Petition for Writ of Certiorari, seeking to have such erroneous judgment reviewed and the judgment of the said Circuit Court of Appeals in said case reviewed by this Honorable Court, and to have such other or further remedy or relief in the premises as to this Honorable Court might seem appropriate.

JURISDICTIONAL STATEMENT

The jurisdiction of this Honorable Court is invoked under Section 240 of the Judicial Code, as amended, 28 U.S.C.A., Sections 347 and 350, and Supreme Court Rule #38.

QUESTIONS PRESENTED

It is conceded in this case that the Highway Insurance Underwriters is properly brought into Court in the Eastern District of Louisiana. The sole question presented by the case, therefore, is whether, under Section 113 of Title 28, U.S.C.A., the Reich Bros. Construction Company and the individual members thereof, who are residents of the Western District of Louisiana, can properly be brought into Court in the Eastern District of Louisiana, because of the fact that their co-defendant is properly suable in that district and is a resident thereof.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

(1) The Honorable Circuit Court of Appeals for the 5th Circuit has rendered a decision which is in conflict with other decisions of the Circuit Courts of Appeals on the same matter and which is in conflict with decisions of this Honorable Court by holding that "citizenship", as required for jurisdictional purposes in the Federal Courts, is synonymous with "residence", as required for venue purposes in the Federal Courts, the principal ground upon which the judgment of the 5th Circuit Court of Appeals was based in this case being that, if the corporation-defendant was declared a resident for venue purposes, then it would thereby be a citizen for jurisdictional purposes.

(2) The Honorable Circuit Court of Appeals for the 5th Circuit has decided an important question of local law in a way clearly in conflict with applicable local decisions by holding that the corporation-defendant in this case is a non-resident of the State of Louisiana,

whereas the laws and jurisprudence of the State of Louisiana make said corporation a resident of that State, the question as to whether or not a party is a resident of a state being a question to be determined by the law of the state.

(3) The Honorable Circuit Court of Appeals for the 5th Circuit has decided an important question of Federal law which has not been but should be settled in this Court, in holding that under Section 113 of Title 28, U.S.C.A., a defendant, citizen and resident of one Federal District of the State cannot be sued in another Federal District of the State where a co-defendant is properly suable.

(4) The Honorable Circuit Court of Appeals for the 5th Circuit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court in holding that the partnership-defendant and the members thereof were not properly suable outside of the district of their residence, and refusing to consider the question of an implied waiver or consent by said defendants to be sued outside of the district of their residence.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the Seal of this Court, directed to the U. S. Circuit Court of Appeals for the 5th Circuit in New Orleans, Louisiana, commanding said Court to certify and send to this Court on a day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case therein, entitled *Mrs. Aba Badger Suttle, Widow of John G. Suttle, individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc. Versus Reich Bros.*

Construction Company et al, being #11849, to the end that the decision of the said Honorable 5th Circuit Court of Appeals may be reviewed, revised, and the errors therein corrected and that, upon hearing of said Cause by this Court, the judgment of the said Honorable 5th Circuit Court of Appeals be reversed, or that such other proceedings be had herein as may be provided by law. Your Petitioner will ever pray.

JOHN D. MILLER,
HENRY G. BLOCH,
JOHN R. ANDERSON,
W. A. BLAIR,
C. F. ENGLE,
S. B. LAUB,
R. BRENT FORMAN,
LAWRENCE ADAMS,
Attorneys for Petitioner.

Of Counsel for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1947.

No. 214

MRS. ABA BADGER SUTTLE, Widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, Deceased, Etc.,

Petitioner,

versus

REICH BROS. CONSTRUCTION CO. ET AL,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN D. MILLER,
HENRY G. BLOCH,
JOHN R. ANDERSON,
W. A. BLAIR,
C. F. ENGLE,
S. B. LAUB,
R. BRENT FORMAN,
LAWRENCE ADAMS,
Attorneys for Petitioner.

Of Counsel for Petitioner.

HAUSER PRINTING CO., INC.

SYLLABUS

Where suit was brought in the Eastern District of Louisiana by a citizen and resident of Mississippi against citizens and residents of the Western District of Louisiana and a Texas corporation whose agent for service of process resided in the Eastern District of Louisiana, and such corporation, by state law, was a resident of the Eastern District, the *venue* was properly laid in either district.

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IN THE

Supreme Court of the United States

October Term, 1947.

No.

MRS. ABA BADGER SUTTLE, Widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, Deceased, Etc.,

Petitioner,

versus

REICH BROS. CONSTRUCTION CO. ET AL,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Point 1

The Honorable Circuit Court of Appeals for the Fifth Circuit has rendered a decision which is in conflict with other decisions of the Circuit Courts of Appeals on the same matter and which is in conflict with decisions of this Honorable Court by holding, in effect, that "Citizenship", as required for jurisdictional purposes in the Federal Courts, is synonymous with "Residence", as required for venue purposes in the Federal Courts, the principal ground upon which the judgment of the Fifth Circuit Court was based in this case being that, if the corporation-defendant was declared a resident for venue

purposes, then it would thereby be a citizen for jurisdictional purposes.

The jurisdiction of the Federal Courts is set out in the Constitution of the United States. Article 3, Section 2 of the Constitution of the United States, states "The judicial power shall extend to * * * controversies between **citizens** of different states."

The venue of the Federal Courts is statutory; Section 113, Title 28 U.S.C. states, "but if there are two or more defendants **residing** in different districts of the state it may be brought in either district." In other words, the jurisdiction of the Federal Courts depend upon **citizenship**; while the venue in this case depends upon **residence.**

Until the decision below the Federal Courts have always recognized the difference between "citizenship" and "residence". The Supreme Court of the United States in the case of *Steigleder vs. McQuesten*, 198 U.S. 141, 49 Lawyers Edition page 986, states "It is to be observed that the grounds assigned for the motion to dismiss the cause, taken alone, did not distinctly raise any question concerning the absence of diverse citizenship; for the motion only stated that the plaintiff and the defendants were, respectively, residents of the State of Washington. But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution, and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States, and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purpose of jurisdiction."

In the case of *LaTourette vs. McMaster*, 248 U.S. 465, 63 Lawyers Edition 362, the Supreme Court of the

United States discusses the distinction between citizenship and residence, and Justice McKenna, speaking for the Court about the South Carolina statute in question in the case, states "The word 'resident' and 'citizen' are both used, each apparently in its ordinary legal sense which is well defined and understood making a distinction which is substantial in its purpose and one that is sanctioned by the highest jurisdictional authority."

We respectfully call the Court's attention to the line of decisions of the United States Supreme Court, distinguishing between the terms "citizenship" and "residence":

Parker vs. Overman, 59 U.S. 318-18 How. 137;

Robertson vs. Cease, 97 U.S. 646, 24 L. Ed. 1057;

Realty Holding Co. vs. Donaldson, 268 U.S. 396, 60 L. Ed. 1014;

Oxley Stone Co. vs. Butler, 166 U.S. 648, 41 L. Ed. 1149;

and this recognized distinction between residence and citizenship is still followed by the Federal Courts, as shown by the following recent decisions:

Fort Knox Transit vs. Humphrey, 151 F. 2nd 602;

Townsend vs. Bucyrus-Erie Co., 144 F. 2nd 106;

Jeffcott et al vs. Donovan, 135 F. 2nd 213;

Fowler vs. Baker, 32 F. Supp. 783;

Hoskie vs. Prudential Ins. Co. of America, 39 F. Supp. 305;

Shreveport Longleaf Lumber Co. vs. Wilson, 38 F. Supp. 629;

Baker vs. Keck, 13 F. Sup. 486;

We particularly call the Court's attention to the case of *Townsend vs. Bucyrus-Erie Company, supra* in which Judge Murrah, speaking for the Circuit Court of Appeals for the Tenth Circuit, states "State citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases under Section 24 of the Judicial Code 28 U.S.C.A. Section 41 (1), and residence in a judicial district for venue purposes under Section 51 of the Judicial Code 28 U.S.C.A. Section 112, are not necessarily one and the same thing—they are not synonymous, coexistent or convertible terms. One may have a residence in a state while his citizenship continues in another." In the case of *Jeffcott vs. Donovan, supra* Judge Stephens, speaking for the Circuit Court of Appeals for the Ninth Circuit, states "Diversity of citizenship as a basis for the jurisdiction of a case in the District Court of the United States is not dependent upon the residence of any of the parties, but upon their citizenship. Bouvier (Baldwin's Student Edition 1934) says: 'Citizen and resident (p. v.) are not synonymous and in some cases distinction is important.' It might well be that a resident of any one state in point of fact may be a citizen of that or any other state." And this is particularly true of a corporation. * * * In *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511, 78 L. Ed. 1396, Justice Cardozo, in referring to the *Taylor* case (266 U.S. 200, 69 L. Ed. 247, 42 A.L.R. 1232) pointed out that in the case cited it had been held that the Plaintiff Delaware corporation, with a usual place of business in Missouri "is a resident of Missouri—that is, has a usual place of business within

the State." As to the Delaware corporation he said: "For many purposes, its domicile in law is in the state of its creation (citing cases), but it is living its life elsewhere. In a very real and practical sense, it is a resident of the forum, like the plaintiff in the *Taylor* case, who was domiciled in one State and resided in another. * * * Residence, however, even though not controlling, is a fact of high significance."

We therefore submit that the Circuit Court of Appeals for the Fifth Circuit was in error in holding that if the corporation were declared a resident of a particular Federal District in a state for venue purposes, it would thereby become a citizen of that state for jurisdictional purposes. At variance with the other Circuits and this Court the Court below held citizen and resident to be synonomous terms.

Point 2

The Honorable Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in conflict with applicable local decisions by holding that the corporation-defendant in this case is a non-resident of the State of Louisiana, whereas the laws and jurisprudence of the State of Louisiana clearly make said corporation a resident of that State.

Citizenship is a term which is defined by the Constitution of the United States in Amendment No. 14 thereof. **Residence,** however, is a term which is not defined by either the Constitution or the statutes of the United States.

The principle of law is too clear to admit of any argument that in all cases except in matters governed by the Constitution or by Acts of Congress, the law to be applied in the Federal Courts is the law of the States.

Townsend vs. Union Trust Company of Maryland, 307 U.S. 646, 83 L. Ed. 1526.

Under the laws of the State of Louisiana, the corporation-defendant in the present case, having complied with the registration laws of the State of Louisiana, and having appointed an agent in that State for service of process, became a resident of the State of Louisiana and of the District in which such agent resides.

White Oil Corporation vs. Flannagan, 153 La. 837, 96 So. 675;

Burgin Bros. vs. Barker Baking Co., 152 La. 1075, 95 So. 227;

Fullilove vs. Central State Bank, 160 La. 831, 107 So. 59;

Noyola vs. Norske Lloyd Ins. Co. Ltd., 163 La. 82, 111 So. 607;

Pittman Bros. Constr. Co. vs. American Indemnity Co., 194 La. 437, 193 So. 699.

The Court below erroneously held, 161 F. 2d. 290, that under the laws of Louisiana such corporations as the co-defendant here become domesticated to the extent that they are not subject to attachment as non-residents. La. Act 267 of 1914, as amended by Act 120 of 1920. These laws do not refer to the subject of attachments against non-residents but cover the method and effect of qualifying to do business in the state. As construed by the State Supreme Court, in the cases cited above, contrary to the reasoning of the Circuit Court of Appeals herein, those laws require such foreign corporations to become residents of the state, for which reason alone they cannot be attached as non-residents.

The Supreme Court of the United States has held

that the question of residence may be differently determined in different states (*Riley vs. N. Y. Trust Company*, 315 U.S. 343, 86 L. Ed., 885) in which case it is announced that conflicting decisions of the states on the matter of residence "is an inevitable consequence of the existing Federal system which endows its citizens with the freedom to choose the state or states within which they desire to carry on business, enjoy their leisure or establish their residence."

In determining the matter of residence, we find the Federal Courts in many cases turning to the Courts of the various states for their decisions on this question. In the case of *Townsend vs. Bucyrus-Erie Co., supra* the Circuit Court of Appeals for the Tenth Circuit cites the case of *Harris vs. Harris*, 205 Ia. 108, 215 N.W. 661 and the case of *Anderson vs. Jackson*, 170 Okla. 612, 41 P. 2nd 815. In the case of *Baker vs. Keck, supra*, Justice Lindley of the Federal Court of the Eastern District of Illinois cites the case of *Dale vs. Irwin*, 78 Ill. 170, in which the Supreme Court of Illinois discusses the statute of the State of Illinois concerning residence, and also cites the case of *Kreitz vs. Behrensmeyer*, 125 Ill. 141, 195, 17 N.E. 232, and the case of *Holt vs. Hendee*, 248 Ill. 288, 93 N.E. 749, in determining the residence of a party in the State of Illinois.

It is well recognized that state legislation and consent of parties may bring about a state of facts which will authorize the Courts of the United States to take cognizance of a case.

Neirbo Co. vs. Bethlehem Shipbuilding Corpn., 308 U.S. 165, 84 L. Ed. 167;

Schollenberger (ex parte) 96 U.S. 369.

We therefore respectfully submit that the Honorable Circuit Court of Appeals for the Fifth Circuit was in error in disregarding the law of the State of Louisiana in determining the residence of the defendant corporation, and directly contrary to the rule of *Eirie R. R. Co. v. Tompkins.* There is no federal common law pertinent to this subject.

Point 3

The Honorable Court of Appeals for the Fifth Circuit has decided an important case of Federal law which has not been but should be settled in this Court, in holding that under Section 113 of Title 28 U.S.C.A., a defendant, citizen and resident in one Federal District of the State cannot be sued in another Federal District of the State where a co-defendant is properly suable.

The precise question of law presented by the instant case is one which should be settled by the Supreme Court of the United States to avoid confusion in procedure in the lower courts. The exact question of venue presented by this case, and the exact situation presented by the facts of this case, have not been decided by the Supreme Court of the United States. In the case of *Barnes vs. Wilson,* 40 F. Supp. 689, the identical situation as in the instant case was presented to the Federal District Court for the Eastern District of Wisconsin. In that case the plaintiff, a resident of California, brought suit against an individual resident of the Western District of Wisconsin, and a foreign insurance corporation which was qualified to do business in the State of Wisconsin, and had appointed an agent for service of process in that state. The action was brought in the Court of the Eastern District of Wisconsin, and the individual defendant moved to dismiss the action on grounds of im-

proper venue. The Court in that case stated: "If the defendant, Wilson, had been sued alone, the proper venue would of course be the Western District of Wisconsin, however, if the defendant insurance company could have been sued in the Eastern District of Wisconsin, the plaintiff had the option when suing both defendants to bring the action in either district." The holding of the Federal District Court of the Eastern District of Wisconsin in this case is directly opposed to the holding of the United States Circuit Court of Appeals for the Fifth District in the instant case.

We respectfully submit that under the present venue rules of the Federal Courts, and the decisions of the United States Supreme Court making foreign corporations amenable to suit in any Federal District of any state in which they have appointed an agent for service of process, the question presented by this instant case will frequently arise, that is, as to the proper venue of a co-defendant of such foreign corporation; and we respectfully submit that this important point of Federal venue should be authoritatively and finally decided and passed upon by the Supreme Court of the United States.

The Court below held that this suit could have been brought in the Western District, where the individual and partnership defendants resided, and service made on the agent of the corporate defendant in the Eastern District, but that it could not be brought in the Eastern District and service made on those defendants in the Western District where they resided. With all respect to that Court it is suggested that this is a distinction without a difference, contrary to the clear intent of the venue statute, and an unreasonable technicality which would prevent the trial of this case where the cause of action arose and the witnesses can be found.

Point 4

The Honorable Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court in holding that the partnership-defendant and the members thereof were not properly suable outside of the district of their residence, and refusing to consider the question of an implied waiver or consent by said defendants to be sued outside of the district of their residence.

Prior to the decision of the United States Supreme Court in *Neirbo vs. Bethlehem Ship Building Company*, 308 U.S. 165, 84 L. Ed. 167, it had not been held that a corporation could be sued outside of the state in which it was incorporated, unless plaintiff resided in the state where suit was brought.

The decision in the *Neirbo* case which subjected a corporation to suit in any state in which it had appointed an agent for service of process, was based on the theory of consent by the corporation to be sued where it had appointed such an agent. It was recognized at the time of this decision, and it has never been disputed that this consent on the part of the corporation was a fictional consent, at least prior to that ruling.

Since the *Neirbo* decision this doctrine of fictional consent has been broadened to include situations where a corporation does not acutally appoint an agent, but where an agent is designated by state statutes; and the doctrine of consent has even been extended to situations where individual defendants who are using the highways of a state have been considered as consenting to be sued in the Federal Courts in that state where a state statute designates an agent for service of process, with respect to non-resident motorists, *Krueger vs. Hider*, 48 F. Supp.

708; *Steele vs. Dennis*, 62 F. Supp. 73; *William vs. James*, 34 F. Supp. 61; *O'Donnell vs. Slade*, 5 F. Supp. 265.

No one could seriously contend that there is actual consent on the part of the defendants in these cases. Consent is implied to the defendants by the Federal Courts. It may be entirely fictional, and it is implied for the purpose of broadening the venue statutes so that a defendant can be sued in the Federal Courts of the state where the cause of action arose, and the consent of the defendants has been extended to cover the Federal Courts in any district in such states.

We can see no reason for not applying the doctrine of consent to the Appellee partnership, and the members thereof, in the present case. The Appellee partnership and its members are presumed to know the law; they, therefore, knew that the corporation was suable in the Eastern District of Louisiana; they knew that they could be made joint defendants with the corporation; they sent their trucks and equipment into the Eastern District of Louisiana in the operation of their business.

We respectfully submit that by their knowledge and their acts they consented to be sued in the Eastern District of Louisiana, and that their consent in this case is in effect a more actual consent than the fictional consent in the situations which we have above mentioned.

We also respectfully call the attention of this Honorable Court to the present tendency of the Federal Courts of the United States toward a more liberal interpretation of the Federal venue statute.

As we have above pointed out, prior to the decision in the *Neirbo* case, a corporation could not be sued outside of the state of its incorporation. The *Neirbo* decision

broadened the effect of the venue statutes so that a corporation could be sued in the Federal Courts of a state in which it appointed an agent for service of process. The question then arose as to whether the venue statute in such cases should be restricted to the district where the agent for service of process resided, and in meeting this situation, the Federal Courts again broadened the effect of the venue statute so that a corporation doing business in a state could be sued in any district in that state regardless of the place of residence of its agent for service of process. *Keen vs. Mid-Continent Petroleum Company*, 58 F. Supp. 915. *Dehne vs. Hillman Investment Co.*, 110 F. 2nd 456. *Oklahoma Packing Co. vs. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 60 S.Ct. 215.

As we have pointed out above, the venue statutes have now been further broadened to extend to individuals who are motorists through a state, and under present decisions of the Federal Courts, such defendants may be sued in any Federal district of the state through which they are motoring. *Krueger vs. Hider, supra. Steele vs. Dennis*, 62 F. Supp. 73.

We ask the Court in this case to hold that the Defendant partnership and its members are suable in the Federal District, in which their co-defendant is suable, where the requisite diversity of citizenship exists between the parties.

We respectfully submit to the Court and strongly urge that the term **residence**, as used in the venue statute in question, means nothing more than amenability to suit, and that since the Defendant corporation is amenable to suit in the Eastern District of Louisiana, then the entire requisite of residence under the venue statute in question has been fulfilled so that the Defendant partner-

ship and the members thereof can be brought into the Eastern District of Louisiana for purposes of this suit. To hold otherwise would be to place such a technical and overrefined construction on the term **residence** as to restrict unnecessarily the venue statute in question and as to run completely counter to the present tendency of the Federal Courts to broaden and liberalize the venue statute.

The Defendant partnership and the members thereof in this case were doing business in the Eastern District of Louisiana and were insured by a corporation which was suable in that District. While engaged in the operation of their business they were involved in the accident upon which this suit is based.

The whole tendency of the Federal Courts, as we have above pointed out, is to allow defendants to be sued in more places, particularly in collision cases, with a view toward allowing such cases to be tried in the Federal Courts of the state and district where such accidents occurred.

We most strongly urge this Honorable Court not to bring to a halt this beneficial trend to a simpler, fairer and more just and more convenient trial of cases in the Federal Courts insofar as venue is concerned, and we most strongly urge that the Defendant partnership and the members thereof in this case not be allowed to escape suit in the Eastern District of Louisiana by strict and technical and, as we most sincerely believe, erroneous judicial construction of the term **residence** in the venue statute in question.

Therefore, for the reasons above stated, we respectfully submit that certiorari herein is required for rectification of the manifest errors in the decision of the

Honorable Fifth Circuit Court of Appeals in the instant case, and Petitioner respectfully prays that Writ of Certiorari be granted to review such decision, and that upon such review, the judgment of the said Honorable Fifth Circuit Court of Appeals be reversed and that the judgment of the Trial Court be reversed, or that such other proceedings be had herein as may be in accordance with law.

Respectfully submitted,

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Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 214

MRS. ABA BADGER SUTTLE, Widow of
JOHN G. SUTTLE, ETC.,

Petitioner,

versus

REICH BROS. CONSTRUCTION COMPANY, ET AL,

Respondent.

BRIEF ON BEHALF OF MRS. ABA BADGER SUTTLE, WIDOW OF JOHN G. SUTTLE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN G. SUTTLE, DECEASED, ETC., PETITIONER.

ENGIE, LAUB,
ADAMS and FORMAN,
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HAUSER PRINTING CO., INC.

SYLLABUS

Where suit was brought in the Eastern District of Louisiana by a citizen and resident of Mississippi against citizens and residents of the Western District of Louisiana and a Texas corporation whose agent for service of process resided in the Eastern District of Louisiana, and such corporation, by state law, was a resident of the Eastern District, the VENUE was probably laid in either district.

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BRIEF ON BEHALF OF MRS. ABA BADGER SUTTLE, WIDOW OF JOHN G. SUTTLE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN G. SUTTLE, DECEASED, ETC., PETITIONER.

STATEMENT OF THE CASE

Mrs. Aba Badger Suttle, widow of John G. Suttle, individually and as Administratrix of the Estate of John G. Suttle, deceased, etc., a citizen and resident of the State of Mississippi, brought this suit in the Federal District Court of the Eastern District of Louisiana, against Reich Bros. Construction Company and the individual members thereof, citizens of Louisiana and residents of the Western District of Louisiana, and the insurer of Reich Bros., Construction Company, the Highway Insurance Underwriters, a Texas corporation,

authorized and qualified to do business in Louisiana, whose agent for service of process resides in the Eastern District of Louisiana, seeking judgment for death, personal injury and property damage resulting from an automobile accident, which occurred on December 10, 1945, in the Eastern District of Louisiana. The Reich Bros. Construction Company and the individual members thereof and also the Highway Insurance Underwriters filed Motions to Dismiss the Plaintiff's complaint on the grounds of improper venue. Upon the hearing of said actions, the U. S. District Court dismissed the motion of the Highway Insurance Underwriters, holding that, under the Consent Doctrine established in the case of *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165; 60 Supreme Court 153; 84 Lawyers' Edition 167, the Highway Insurance Underwriters was properly brought into Court in the Eastern District of Louisiana and might equally as well have been brought into Court in the Western District of Louisiana. But the District Court upheld the Motion of the Reich Bros. Construction Company and the individual partners thereof, and dismissed the Plaintiff's suit as to them, holding that these Defendants had a right to insist on being sued in the District of their residence unless their co-defendant was a resident of the other district of the State and that the co-defendant, the Highway Insurance Underwriters, was not a resident of the other district of the State; therefore, that the Reich Bros. Construction Company and the individual members thereof could be sued only in the district of their residence. An appeal was taken from this judgment to the U. S. Circuit Court of Appeals for the Fifth Circuit and the said Circuit Court of Appeals affirmed said judgment, in an opinion reported in 161 F. 2d. 289, holding that the Highway Insurance Underwriters was

not a resident of the Eastern District of Louisiana and, therefore, that the Reich Bros. Construction Company and the individual partners thereof had a right to object to being sued outside of the district of their residence.

Petitioners then presented a Petition for Rehearing to the Circuit Court of Appeals. Same was denied without written opinion.

ASSIGNED ERRORS TO BE ARGUED

The errors in the opinion below and the decree based thereon are:

(a). The question which is determinative of this case is: was the co-defendant, Highway Insurance Underwriters, a resident of the Eastern District of Louisiana for Federal venue purposes. The Circuit Court of Appeals said, 161 F. 2d. at page 290: "The question must be decided under Federal law for it is apparent that if a foreign corporation which had qualified under the state statutes to do business in Louisiana were held to be an inhabitant, resident, or citizen of Louisiana to the same extent as a domestic corporation, then no citizen of Louisiana could sue such a foreign corporation in the Federal Courts of that state, nor could such a case be removed to the Federal Court. The impact of such a holding on the jurisdiction of the Federal Courts would be so devastating that if such a result is to be achieved it must come through Congressional legislation rather than through state statutes and decisions thereon." And, on page 291: "The corporate defendant was neither a resident nor an inhabitant of the Eastern District of Louisiana," Both of the quoted statements are erroneous, the second wholly and the first in all material respects.

(b). The Circuit Court of Appeals erred in holding that the Eastern District of Louisiana was without jurisdiction of the defendants in the Western District.

(c). That Court erred in refusing to recognize that state law alone determines the status of parties within a state, as residents, as distinguished from their citizenship or domicile.

(d). The Court erred in overlooking or not considering the fact that by doing business with the Corporation the Partnership respondents consented to be sued in any district in which jurisdiction was proper as to the Corporation.

(e). The Court erred in holding in effect that the Federal venue statutes are subject to as strict an interpretation as the Federal jurisdiction statutes, and further erred in disregarding the present tendency of the United States Supreme Court toward a more liberal interpretation of the Federal venue statutes.

ARGUMENT

The primary error in the Circuit Court of Appeals was in confusing citizenship with residence. If the terms as used in the venue statute are synonymous that Court was correct; otherwise, it was manifestly wrong. Since the law does not define "residence" and no definition of residence can be found in any other Act of Congress, it is necessary to look to the law of the State to ascertain whether or not a person or corporation is a resident of such state. The authorities support this claim.

Jud. Code, Section 52, 28 U.S.C.A. 113, provides: "When a state contains more than one District, every suit of a local nature, in the District Court thereof, against a single defendant, inhabitant of such state,

must be brought in the District where he resides; but if there are two or more defendants, residing in different Districts of the state, it may be brought in either District, and a duplicate writ may be issued against the defendants, directed to the Marshal of any other District in which any defendant resides." Substantially, the same language will be found in Judicial Code, Sec. 53. U.S.C.A., Sec. 112, reads in part: "When the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the District of the residence of either the plaintiff or the defendant." This Section contains an exception as to the situations contemplated in Sections 113 to 117.

This venue statute refers both to citizenship (the Constitutional basis of jurisdiction) and residence or inhabitancy (regulating venue alone) and the context and plain meaning of the law shows that the terms are used as referring to different matters and that they are not identical as held below.

If Highway Insurance Underwriters, a Texas corporation, doing business in Louisiana and which had appointed the Secretary of State of Louisiana, residing in the Eastern District of the State, as its Agent for service of process, was a resident of the Eastern District, venue was properly laid in that District as to the defendants residing in the Western District.

The Circuit Court of Appeals announced, *ex cathedra*, that a corporation could not be a resident of any District other than that in which it was created, but pointed to no constitutional or statutory authority in support of what, lacking such authority, seems to be bare judicial legislation.

All of the powers of the people and of the states which were not delegated to the national government were reserved to the states or to the people. Petitioners believe that among those reserved powers is that of determining who are and who are not citizens of the State, (except as modified by later amendment), and who are and who are not residents of the State.

The State of Louisiana has clearly and unequivocally provided in its laws, as interpreted and applied by the highest Court of the State, that foreign corporations qualified to transact business there, such as the corporate defendant in this case, are residents of the State, and of the Parish where localized, as fully and to the same effect as if such corporations had been organized in and domiciled in the State. The Circuit Court of Appeals erroneously refused to give any effect to this law and jurisprudence. The Court ignored the fact that only by reference to the laws of Louisiana can it be determined who are residents of that State to whom the Federal venue statute may be applied. It is doubtful if the Congress has the Constitutional power to declare who are residents of a State, and it is certain that the Congress has never attempted to exercise such power.

Under Louisiana Act 267 of 1914, as amended by Act 120 of 1920, a foreign corporation, on complying with its requirements, has "the same powers, rights and privileges" as domestic corporations. Dart's Stat. 1246. Such corporations are on a parity for all practical purposes, with those created under Louisiana laws. *Simms Oil Co. vs. Wolfe.* 3 Fed. (2d) 36.

The jurisprudence of Louisiana is uniform to the effect that a domesticated foreign corporation is a "resident" of Louisiana.

In *White Oil Corp. v. Flanagan*, 153 La. 837, 96 So. 675, the designated place of business of a Delaware Corporation in Louisiana was termed its "designated domicile."

In *Gulf Refining Co. v. Tillinghart*, 152 La. 847, 94 So. 418, the Supreme Court of the State held that where a corporation from another state had not made a declaration of its LOUISIANA DOMICILE the Legislature had the power to fix the situs of its property for local taxation. See also, to the same effect, the concurring opinion of Justice Land, in *Union Tank Line v. Day*, 143 La. 771, 79 So. 334.

Art. 240 of the Louisiana Code of Practice, which sets out the grounds for attaching the property of debtors, includes as one such ground, in Sec. "(2)", the following: "When such debtor resides out of the State." *Burgin Bros. v. Barker Baking Co.*, 152 La. 1075, 95 So. 227; and *Fullilove v. Central State Bank*, 160 La. 831, 107 So. 590, held squarely that a corporation, though organized under the laws of another state, when it complied with the State law and registered an agent for the service of process, was not subject to attachment as a non-resident. On the other hand, a foreign corporation which does business there without appointing such an agent, is subject to attachment as a non-resident. *Palmer v. Avalon Oil Co.*, 10 La. App. 512, 120 So. 781.

The Louisiana courts in the cases cited hold this to be purely a question of local law, and refuse to consider contrary rulings in other jurisdictions.

In the *Fullilove* case (160 La. 831, 107 So.—590) the Court stated that such a corporate defendant could not be proceeded against as a non-resident, and the clear and unavoidable effect of the *Burgin* (152 La. 1075)

case is that foreign corporations complying with the State laws must be treated for jurisdictional and other purposes as residents. They have the same powers, rights and privileges as are accorded domestic corporations.

In the *Burgin* case, 152 La. at page 1078, we find the following reasoning, which is determinative of the issue before this Honorable Court: "As defendant company, though formed under the laws of Tennessee, is domiciled in this State, it is a 'domestic' corporation within the definition of Sec. 23 of Act 267 of 1914, and is not subject to attachment as a 'foreign' corporation, on the ground of non-residence. * * *

* * * "A natural person can have but one domicile. On the other hand, an artificial person or corporation, may be created by the laws of several states, and become a distinct corporation in each, and domiciled therein, and may be sued as such distinct corporation, in the state in which it has been incorporated and in which it had a domicile." (Citing authorities.

On rehearing (p. 1081) the Court said: "Attachments of the second class (against non-residents) are clearly applicable only in the cases of absentees or of non-residents." The attachment was set aside because this Tennessee corporation was not a non-resident. And at P. 1082: "The reason and the policy of the enactment is to be found in the desire of the Legislature to substitute for the inadequate remedy of the Code of Practice, at least so far as foreign corporations are concerned, a method whereby such corporations may become subject to the full and complete jurisdiction of the courts of the state. * * * "

"It would seem, therefore, to be almost too plain to admit of argument to the contrary, that a foreign

corporation doing business within the State and with an Agent residing therein for the purpose of service of legal process is subject personally to the jurisdiction of the courts, **and is to be regarded as a resident for all purposes connected with legal process.**" (Emphasis supplied.)

The Court cited with approval Thompson's Commentaries on Corporations, Vol. 6, p. 6420: "We have already had occasion to note the principle that foreign corporations may become domesticated so as to be, for all purposes of jurisdiction and procedure, domestic corporations within the State in which they acquire a qualified settlement and residence for the purpose of their business."

In *Noyola v. Norske Lloyd Insurance Co. Ltd.*, 163 La. 82, 111 So. 607, we find: "All foreign insurance companies doing business in the State are required to appoint the Secretary of State as their agent for service of process. Act 105 of 1898, Art. 2, Sec. 1, p. 142. The Norske Lloyd Insurance Co. Ltd. complied with the provisions of the statute. Therefore, said corporation acquired a qualified residence within the State for the purpose of its business, and became domesticated, at least, **for all purposes of jurisdiction and legal procedure.** The place of its residence, insofar as the service of legal process is concerned, is necessarily the office of the Secretary of State at Baton Rouge." (Emphasis supplied.)

In citing this case, with approval, in *Pittman Bros. Construction Co. v. American Indemnity Co.*, 194 La. 437, 193 So. 699, the State Supreme Court said: "The compliance with the provisions of Act No. 9 of 1934, by defendant, The American Indemnity Company, a foreign corporation, has likewise domesticated that corporation

for the purpose of jurisdiction and legal process in this state, and the place of its residence, insofar as the service of legal process is concerned, is necessarily the office of the Secretary of State at Baton Rouge, Louisiana."

The domicile of a domesticated corporation is in the Parish where its agent for service of process is located. *Nelvon v. Continental Co.*, 11 La. App. 450, 123 So. 474.

One of the clearest statements of the powers of the States will be found in the recent case of *Stewart v. Ferer*, 163 F. 2d. 183, 185, C.C.A. 10: "A sovereign state has jurisdiction to determine the civil status and capacities of its inhabitants and to prescribe the conditions on which judicial proceedings affecting them may be commenced and carried on within its territory." This is directly contrary to what the Fifth Circuit held here.

The residence of a corporation is any county in which it does business. Black's Law Dict. 3rd Ed. p. 1543, citing numerous cases.

In this case the Highway Insurance Underwriters was just as much an inhabitant ("resident") of the Eastern District of Louisiana as any corporation, domestic or foreign, could be.

It was held below in effect that Highway Insurance Underwriters was enough of a resident to be sued there, but not enough of a resident to justify joining with them the defendants from the Western District.

Until the decision below the Federal Courts have always recognized the difference between "citizenship" and "residence." This Court in the case of *Steigleder v. McQuesten*, 198 U.S. 151, 49 Lawyers Edition page 986, states "It is to be observed that the grounds assigned for the motion to dismiss the cause, taken alone, did not distinctly raise any question concerning the absence of diverse citizenship; for the motion only stated that

the plaintiff and the defendants were, respectively, residents of the State of Washington. But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution, and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States, and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purpose of jurisdiction."

In the case of *LaTourette v. McMaster*, 248 U.S. 465, 63 Lawyers Edition 362, this Court discusses the distinction between citizenship and residence, and Justice McKenna, speaking for the Court about the South Carolina statute in question in the case, states "The word 'resident' and 'citizen' are both used, each apparently in its ordinary legal sense which is well defined and understood making a distinction which is substantial in its purpose and one that is sanctioned by the highest judicial authority."

We respectfully call the Court's attention to the line of decisions of the United States Supreme Court, distinguishing between the terms "citizenship" and "residence":

Parker v. Overman, 59 U.S. 318-18 How. 137;
Robertson v. Cease, 97 U.S. 646, 24 L. Ed. 1057;
Realty Holding Co. v. Donaldson, 268 U.S. 396, 60 L. Ed. 1014;
Oxley Stone Co. v. Butler, 166 U.S. 684, 41 L. Ed. 1149;

and this recognized distinction between residence and citizenship is still followed by the Federal Courts, as shown by the following recent decisions:

Fort Knox Transit v. Humphrey, 151 F. 2nd 602;

Townsend v. Bucyrus-Erie Co., 144 F. 2nd 106;
Jeffcott et al v. Donovan, 135 F. 2nd 213;
Fowler v. Baker, 32 F. Supp. 783;
Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305;
Shreveport Longleaf Lumber Co. v. Wilson, 38 F. Supp. 629;
Baker v. Keck, 13 F. Supp. 486.

We particularly call the Court's attention to the case of *Townsend v. Bucyrus-Erie Company*, 144 F. 2d 106, in which Judge Murrah, speaking for the Circuit Court of Appeals for the Tenth Circuit, states: "State citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases under Section 24 of the Judicial Code 28 U.S.C.A. Section 41 (1), and residence in a judicial district for venue purposes under Section 51 of the Judicial Code 28 U.S.C.A. Section 112, are not necessarily one and the same thing—they are not synonymous, coexistent or convertible terms. One may have a residence in a state while his citizenship continues in another." In the case of *Jeffcott v. Donovan*, 135 F. 2d 215, Judge Stephens, speaking for the Circuit Court of Appeals for the Ninth Circuit, states "Diversity of citizenship as a basis for the jurisdiction of a case in the District Court of the United States is not dependent upon the residence of any of the parties, but upon their citizenship. Bouvier (Baldwin's Student Edition 1934) says: 'Citizen and resident (q.v.) are not synonymous and in some cases distinction is important'. It might well be that a resident of any one state in point of fact may be a citizen of that or any other state." And this is particularly true of a corporation. * * * In *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511, 78 L. Ed. 1936, Justice Cardozo, in referring to the *Taylor* case (266 U.S. 200, 69 L. Ed. 247, 42 A.L.R. 1232) pointed

out that in the case cited it had been held that the Plaintiff Delaware corporation, with a usual place of business in Missouri "is a resident of Missouri—that is, has a usual place of business within the State." As to the Delaware corporation he said: "For many purposes, its domicile in law is in the state of its creation (citing cases), but it is living its life elsewhere. In a very real and practical sense, it is a resident of the forum, like the plaintiff in the *Taylor* case, who was domiciled in one State, and resided in another. * * * Residence, however, even though not controlling, is a fact of high significance."

We therefore submit that the Circuit Court of Appeals for the Fifth Circuit was in error in holding that if the corporation were declared a resident of a particular Federal District in a state for venue purposes, it would thereby become a citizen of that state for jurisdictional purposes. At variance with the other Circuits and with this Court, the Court below held citizen and resident to be synonymous terms, and thereby denied to plaintiff a substantial right, that is to sue all defendants in one suit where the cause of action arose.

Prior to the decision of the United States Supreme Court in *Neirbo v. Bethelem Ship Building Company*, 308 U.S. 165, 84 L. Ed. 167, a corporation could not be sued outside of the state in which is was incorporated, unless plaintiff resided in the state where the suit was brought.

The decision in the *Neirbo* case which subjected a corporation to suit in any state in which it had appointed an agent for service of process, was based on the theory of consent by the corporation to be sued where it had appointed such an agent. It was recognized at the time of this decision, and it has never been

disputed that this consent on the part of the corporation was a fictional consent.

Since the Neirbo decision this doctrine of fictional consent has been broadened to include situations where a corporation does not actually appoint an agent, but where an agent is designated by state statutes; and the doctrine of consent has even been extended to situations where individual defendants who are using the highways of a state have been considered as consenting to be sued in the Federal Courts in that state where a state statute designates an agent for service of process, with respect to non-resident motorists, *Krueger vs. Hider*, 48 F. Supp. 708.

No one could seriously contend that there is actual consent on the part of the defendants in these cases. Consent is implied to the defendants by the Federal Courts, and is entirely fictional, and it is implied for the purpose of broadening the venue statutes so that a defendant can be sued in the Federal Courts of the state where the cause of action arose, and the consent of the defendants has been extended to cover the Federal Courts in any district in such states.

We can see no reason for not applying the doctrine of consent to the respondent partnership, and the members thereof, in the present case. The respondent partnership and its members are presumed to know the law; they therefore, knew that the corporation was suable in the Eastern District of Louisiana; they knew that they could be made joint defendants with the corporation; they sent their trucks and equipment into the Eastern District of Louisiana in the operation of their business.

We respectfully submit that by their knowledge and their acts they consented to be sued in the Eastern

District of Louisiana, and that their consent in this case is in effect a more actual consent than the fictional consent in the situations which we have above mentioned.

The decision of the Circuit Court of Appeals in this matter, if carried to its logical conclusion, would be discriminatory in nature. It would mean that the defendant, Reich Bros. Construction Co., and the individual members thereof, would be in a better position, having taken out insurance with a foreign corporation than they would be if they had taken out insurance with a corporation which had been incorporated in the Eastern District of Louisiana.

As we have above pointed out, prior to the decision in the *Neirbo* case, a corporation could not be sued outside of the state of its incorporation. The Neirbo decision broadened the effect of the venue statutes so that a corporation could be sued in the Federal Courts of a state in which it appointed an agent for service of process. The question then arose as to whether the venue statutes in such cases should be restricted to the district where the agent for service of process resided, and in meeting this situation, the Federal Courts again broadened the effect of the venue statutes so that a corporation doing business in a state could be sued in any district in that state regardless of the place of residence of its agent for service of process. *Keen vs. Mid-Continent Petroleum Company*, 58 F. Supp. 915. *Dehne vs. Hillman Investment Company*, 110 F. 2nd. 456. *Oklahoma Packing Company vs. Oklahoma Gas & Electric Company*, 309 U.S. 4, 60 S. Ct. 215.

The venue statutes have now been further broadened to extend to individuals who are motorists through a state, and under present decisions of the Federal Courts, such defendants may be sued in any district of the state

through which they are motoring. *Krueger vs. Hider*, 48 Fed. Supp. 708; *Steele vs. Dennis*, 62 F. Supp. 73.

We ask the Court in this case to hold that the respondent partnership and its members are suable in the Federal District in which their co-defendant is suable, where the requisite diversity of citizenship exists between the parties.

We respectfully submit to the Court and strongly urge that the term residence, as used in the venue statutes in question, means nothing more than amenability to suit, and that since the corporate defendant is amenable to suit in the Eastern District of Louisiana, then the entire requisite of residence under the venue statutes in question has been fulfilled so that the respondent partnership and the members thereof can be brought into the Eastern District of Louisiana for purposes of this suit. To hold otherwise would be to place such a technical and over-refined construction on the term residence as to unnecessarily restrict the venue statutes in question and as to run completely counter to the present tendency of the Federal Courts to broaden and liberalize the venue statutes of the United States, in contrast to the strict construction of all jurisdictional requirements.

The respondent partnership and the members thereof in this case were doing business in the Eastern District of Louisiana and were insured by a corporation which was suable in that District. While engaged in the operation of their business there they were involved in the accident upon which this suit is based.

The whole tendency of the Federal Courts, as we have above pointed out, is to allow defendants to be sued in more places, particularly in collision cases, with

a view toward allowing such cases to be tried in the Federal Courts of the State and district where such accidents occurred.

We most strongly urge this Honorable Court not to bring to a halt this beneficial trend to a simpler, fairer and more just and more convenient trial of cases in the Federal Courts insofar as venue is concerned, and we most strongly urge that the respondent partnership and the members thereof in this case not be allowed to escape suit in the Eastern District of Louisiana by strict and technical and, as we most sincerely believe, erroneous judicial construction of the term **residence** in the venue statutes in question.

We therefore submit that for all of the reasons above cited, the judgment of the Circuit Court of Appeals Fifth Circuit in this case should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 214

MRS. ABA BADGER SUTTLE, Widow of JOHN G. SUTTLE, etc.,

Petitioner,

versus

REICH BROS. CONSTRUCTION CO., ET AL.,

Respondents.

BRIEF ON BEHALF OF REICH BROS. CONSTRUCTION CO. AND INDIVIDUAL MEMBERS, Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 214.

MRS. ABA BADGER SUTTLE, Widow of JOHN G. SUTTLE, etc.,

Petitioner,

versus

REICH BROS. CONSTRUCTION CO., ET AL.,

Respondents.

BRIEF ON BEHALF OF REICH BROS. CONSTRUCTION CO. AND INDIVIDUAL MEMBERS, Respondents.

MAY IT PLEASE THE COURT:

This is a suit seeking damages in excess of $3,000 brought by citizens and residents of the State of Mississippi against citizens and residents of the State of Louisiana and a Texas corporation qualified to do business in the State of Louisiana, under the diversity of citizenship provisions of Title 28, U. S. C. A., Sec. 41(1).

STATEMENT OF CASE.

The state of Louisiana is comprised of two Federal Districts, Eastern and Western. Respondents are citizens and residents of the Western District of Louisiana. This suit was filed in the Eastern District of Louisiana.

The sole question here presented is the correctness of the ruling of the trial court in sustaining a motion to dismiss on the ground of improper venue as to respondents, which ruling was affirmed by the Circuit Court of Appeals, Fifth Circuit, 161 F. 2d 289. The *writ of certiorari* was granted by this Honorable Court at the October, 1947 term to review the decision of the Circuit Court of Appeals, *supra*.

Statutory law governing venue is found in Title 28, U. S. C. A., §112, 113; Judicial Code, §51, 52, which read as follows:

> "* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but **where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;** * * *." (Emphasis ours.)
>
> **"When a State contains more than one district, every suit** not of a local nature, **in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides;** but **if there are two or more defendants, re-**

siding in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides." (Emphasis ours.)

LAW AND ARGUMENT.

Being unaware as to which of the Reasons for Allowance of *Writ of Certiorari* appearing on pages 4 and 5 of the petition for writ actuated the granting of the application, we will answer the assigned errors in the order therein stated:

Appellant's Error No. 1.

"(1) The Honorable Circuit Court of Appeals for the 5th Circuit has rendered a decision which is in conflict with other decisions of the Circuit Courts of Appeals on the same matter and which is in conflict with decisions of this Honorable Court by holding that 'citizenship', as required for jurisdictional purposes in the Federal Courts, is synonymous with 'residence', as required for venue purposes in the Federal Courts, the principal ground upon which the judgment of the 5th Circuit Court of Appeals was based in this case being that, if the corporation-defendant was declared a resident for venue purposes, then it would thereby be a citizen for jurisdictional purposes."

Petitioner has failed to grasp during the entire course of this litigation the historic and fundamental relation-

ship as to the word "citizen" used in Title 28, U. S. C. A., Sec. 41(1), Judicial Code, Sec. 24, involving the jurisdiction or right of the court to adjudicate, and the words "inhabitant" and "resident" as used in the venue provisions of Title 28, U. S. C. A., Secs. 112-113, Judicial Code, Secs. 51-52, involving the place or jurisdiction in which the suit must be brought.

The reason for the use of the term "citizen" in the jurisdictional provision and use of the terms "inhabitant" and "resident" in the venue provisions of the Judicial Code was pointed out many years ago. It was stated that the word "inhabitant" was equivalent to the word "citizen" as used in Title 28, U. S. C. A., Sec. 112, providing that when a state contains more than one district every suit not of a local nature in the circuit or district courts thereof against a single defendant, inhabitant of such state, must be brought in the district where he resides, and was used to avoid the incongruity of speaking of citizens of anything less than a state, while the word inhabitant applies to a citizen of any district in a state which was divided into more than one district. *Firestone Tire & R. Co. v. Vehicle Equipment Co.*, 155 F. 676, citing *Galveston, H. & S. A. R. Co. v. Gonzales*, 14 S. Ct. 401, 151 U. S. 496, 38 L. Ed. 248.

There has been no deviation by this Honorable Court since the amendment of the Judiciary Act in 1888 from the legal proposition that when jurisdiction is founded on diversity of citizenship the terms "citizen", "inhabitant" and "resident" are synonymous within the meaning of Section 51 of the Judicial Code. It follows there

has been no deviation from the principle that a corporation cannot be a "citizen", "inhabitant" or "resident" of any state other than that in which it was created within the meaning of the jurisdiction and venue provisions of the Judicial Code.

"A corporation is not a citizen, inhabitant, or resident of a state in which it has not been incorporated, within the meaning of Act Aug. 13, 188, c. 866, requiring a civil suit to be brought in the district of which defendant is an inhabitant, or where the jurisdiction is founded on diverse citizenship, in the district of the residence of either plaintiff or defendant."

In re Keasbey & Mattison Co., (1895), 160 U. S. 221, 16 S. Ct. 273, and cases therein cited.

"A corporation is not a citizen, inhabitant, or resident of a state in which it has not been incorporated, within the meaning of statutes requiring a civil suit to be brought in the district of which defendant is an inhabitant, or, where the jurisdiction is founded on diverse citizenship, in the district of the residence of either plaintiff or defendant.

U. S. N. Y., 1895. In re Keasbey & Mattison Co., 16 S. Ct. 273, 160 U. S. 221, 40 L. Ed. 402.

C. C. Colo., 1895. Rust v. United States Waterworks Co., 70 F. 129, 17 C. C. A. 16.

C. C. Ill., 1888. Jessup v. Illinois Cent. R. Co., C. C., 36 F. 735.

C. C. Iowa, 1890. Myers v. Murray, Nelson & Co., C. C., 43 F. 695, 11 L. R. A. 216.

C. C. Mo., 1881. Eaton v. St. Louis Shakspear Mining & Smelting Co., C. C., 7 F. 139.

C. C. Mo., 1889. Booth v. St. Louis Fire Engine Mfg. Co., C. C., 40 F. 1.

C. C. N. Y., 1850. Day v. Newark India-Rubber Mfg. Co., Fed. Cas. No. 3,685, 1 Blatchf. 628, 1 Fish. Pat. Rep. 394.

C. C. N. Y., 1857. Pomeroy v. New York & N. H. R. Co., Fed. Cas. No. 11,261, 4 Blatchf. 120.

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C. G. N. Y., 1890. National Typographic Co. v. New York Typographic Co., C. C., 44 F. 711.

C. C. Vt., 1870. Myers v. Dorr, Fed. Cas. No. 9,988, 13 Blatchf. 22, 20 Fed. Dig. 664.

To same effect, see also 35 C. J. S., Sec. 21, pg. 818, Federal Courts, and authorities cited; Title 28, U. S. C. A., Sec. 112, footnote 13, pg. 50, and authorities cited; Words and Phrases, Volume 21, Inhabit, etc., pg. 337 (citizen), pg. 340 (corporation); Annotation 119, A. L. R. 667, heading "II In General", and cases cited.

In the case of *Seaboard Rice Milling Co. v. Chicago, R. I. & P. Ry. Co.*, (1943) 46 S. Ct. 247, 270 U. S. 363, this Honorable Court held:

> "It is immaterial whether the general federal jurisdiction in the present suit is founded upon diversity of citizenship alone, or whether the suit is also one arising under the laws of the United States, since neither the Milling Company nor the Railway Company is a resident of the Eastern District of Missouri; a corporation being, within the meaning of the jurisdictional statutes, a resident of the State in which it is incorporated, and not a resident or inhabitant of any other State, although it may be engaged in business within such other State. In re Keasbey & Mattison Co., 16 S. Ct. 273, 160 U. S.

221, 229, 40 L. Ed. 402; Macon Grocery Co. v. Atlantic Coast Line, supra, 509; and cases cited."

For the purpose of showing unanimity of the lower courts in following the aforesaid principles of law as enunciated by this Honorable Court to the effect that the terms "citizen", "inhabitant" and "resident" are synonymous within the meaning of 28 U. S. C. A., Sec. 112, Judicial Code, Sec. 51, we quote from a few of such decisions as follows:

"'Citizen,' 'inhabitant,' and 'resident' are for jurisdictional purposes synonymous terms (Jud. Code §51 [28 U. S. C. A., §112])."

Standard Stoker Co., Inc. v. Lower, et al., 46 F. 2d 678.

"* * * But it is well established that the words 'inhabitant' and 'resident in', as used in Section 51 of the Judicial Code, mean neither more nor less than legal domicile, as the result of which jurisdiction except by consent is confined to the district in the State of which one or the other of the parties is a citizen. See Shaw v. Quincy Mining Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. Ed. 768; In re Keasbey & Mattison Co., 160 U. S. 221, 228, 16 S. Ct. 273, 40 L. Ed. 402; Bicycle-Stepladder Co. v. Gordon, C. C., 57 F. 529; United States v. Gronich, D. C., 211 F. 548. Cf. Camp v. Gress, 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 997; Putnam v. Ickes, 64 App. D. C. 339, 78 F. 2d 223; King v. Wall & Beaver Street Corporation, 145 F. 2d 377."

In the case of *Edgewater Realty Co. v. Tenn. Coal, Iron & Railroad Co.*, (1943) 49 F. 807;, the Court said:

> "* * * Since the jurisdiction of this Court in the present suit is grounded upon diversity of citizenship of the parties, whether this Court is the proper forum is governed by Section 51 of the Judicial Code, 28 U. S. C. A., §112, which provides that '* * * where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' It is well settled that for the purposes of this section, 'citizen', 'inhabitant' and 'resident' are synonymous terms and that, therefore, a corporation is a resident only of the State of its incorporation, and of the District (when that State comprises more than one District) of the corporation's head office,—Shaw v. Quincy Mining Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. Ed. 768; In re Keasbey & Mattison Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402,—and until very recently the requirement of Section 51 could not be waived. See Neirbo Co. v. Bethlehem Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437. Thus, since Edgewater is a Maryland corporation, we find no difficulty as respects the question of venue."

See also *Anderson v. Standard Accident Ins. Co.*, 36 F. 7;

Vogel v. Crown Cork & Seal Co., Inc., 36 F. 74;

U. S. v. Phillips Petroleum Co., et al., 36 F. 480;

Richard v. Franklin County Distilling Co., 38 F. 513.

We are unable, in view of the above authorities, to acquiesce in the statement contained in the petition (Pg.

4) that the decision rendered in this cause by the Fifth Circuit Court is in conflict with decisions of this Honorable Court and other Circuit Courts on this point. We submit there is complete unanimity by the courts on this principle of law.

A review of the decisions quoted and referred to on pages 10, 11, 12 of petitioner's brief as constituting a conflict with authorities hereinabove cited emphasizes the statement heretofore made in this brief that petitioner has not grasped the issue presented. Without burdening the Court with individual treatment of each case cited by petitioner in substantiation of his contention, suffice it to say that all of the cases cited deal with the question of jurisdiction—the power to adjudicate—and correctly hold there must be a diversity of citizenship. We readily concede diversity of "residence" does not answer the requirements of 28 U. S. C. A., Sec. 41(1), but we submit that after diversity of "citizenship" has been established, and suit is brought in the state in which the defendant is a citizen, it must be brought in the district in which he is an inhabitant or in which he resides to meet the requirements of 28 U. S. C. A., Sec. 113. It is significant that not one of the cases cited by opposing counsel involved a corporation. The reason is obvious, since a corporation, unlike an individual, cannot change citizenship, and the factual question never arises. The corporation is always a "citizen", "inhabitant" or "resident" of the state of incorporation, while an individual may be a citizen of one state and reside in another.

The erroneous contention of petitioner that the co-defendant in this suit, Highway Insurance Underwriters, a Texas corporation, is a resident of the Eastern District of Louisiana within the meaning of the jurisdiction and venue provisions of the Judicial Code is necessarily based on the decision of this Honorable Court in the case of *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, 60 S. Ct. 153. Opposing counsel apparently overlooked the following statement in the opinion, which was the very basis of the holding:

> "The suit was based on diversity of citizenship and was not brought 'in the district of the residence of either the plaintiff or the defendant.'"

Your Honors subsequently, in the case of *Mississippi Pub. Corporation v. Murphree*, 326 U. S. 438, 66 S. Ct. 242, reiterated the finding of the Neirbo case quoted above and affirmed the jurisprudence which had been followed since the amendment of the Judiciary Act in 1888 to the effect that a corporation is a citizen or resident only of the state of its organization for purposes of jurisdiction, in the following language (Pg. 244):

> "* * * Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, on which petitioner relies, supports no different conclusion. There the sole ground of jurisdiction was diversity of citizenship of the parties. The foreign corporation was sued in the district court for southern New York, in which neither the plaintiff nor the defendant was a citizen or resident,[2] but where the defendant was doing business, maintained an office, and had consented to be sued by appoint-

ing a resident agent to receive service of process. Recognizing that §51 of the Judicial Code, in cases where the jurisdiction is founded on diversity of citizenship, establishes venue as the place where the suit may be maintained for the convenience of the parties, and that the statutory venue for a suit of which the court has jurisdiction may be waived, we held that the corporation had waived objections to venue by its consent to the suit. * * *"

The footnote indicated by the numeral 2 above, and which is part of the decision, reads as follows:

"[2]For purposes of jurisdiction a corporation is a citizen or resident only of the State of its organization. Shaw v. Quincy Mining Co., 145 U. S. 444, 451, 12 S. Ct. 935, 938, 36 L. Ed. 768; In re Keasbey & Mattison Co., 160 U. S. 221, 229, 16 S. Ct. 273, 275, 40 L. Ed. 402; Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501, 509, 30 S. Ct. 184, 187, 54 L. Ed. 300; Seaboard Rice Milling Co. v. Chicago, etc., Ry. Co., 270 U. S. 363, 366, 46 S. Ct. 247, 248, 70 L. Ed. 633."

Appellant's Error No. 2.

"(2) The Honorable Circuit Court of Appeals for the 5th Circuit has decided an important question of local law in a way clearly in conflict with applicable local decisions by holding that the corporation-defendant in this case is a non-resident of the State of Louisiana, whereas the laws and jurisprudence of the State of Louisiana make said corporation a resident of that State, the question as to whether or not a party is a resident of a state being a question to be determined by the law of the state."

This proposition could not be seriously contended. It is hornbook law that in determining jurisdiction and venue under federal statutes, the federal courts look to their own regulations, laws and procedure. The legal question as to the state of citizenship and residence of a litigant in the federal courts when jurisdiction and venue were involved, is and has always been determined by federal law, and state laws pertaining thereto were inapplicable.

Every instance in which a state has attempted to restrict or enlarge the jurisdiction of federal courts has been ruled unconstitutional. There is a line of decisions holding unconstitutional legislation by a number of states seeking to deny a foreign corporation access to the federal courts as a condition precedent to doing business in the particular state.

It is axiomatic under our system of courts, that the determination of jurisdiction and venue is an inherent power and goes to the very foundation of the existence of our courts.

To hold that a state could by legislation or jurisprudence make a foreign corporation a citizen or resident thereof, so as to deprive such corporation of its constitutional right of access to the federal courts, is unthinkable. Furthermore, should the federal courts attempt to determine citizenship and residence under the jurisdiction and venue statutes of every litigant according to the laws of the states in which each might have resided, there

would result a hodgepodge of jurisprudence of unimaginable proportions.

However, there is no need of conjecture as to existing law on this point. Your Honors stated in the case of *Mississippi Pub. Corporation v. Murphree, supra,* that:

> "* * * And since the consent is to suits in the federal courts, it is a consent to suits brought in conformity to the federal regulations governing the jurisdiction, venue and procedure of those courts. Ex parte Schollenberger, supra, 96 U. S. 377, 24 L. Ed. 853; Neirbo Co. v. Bethlehem Shipbuilding Corp., supra, 308 U. S. 175, 60 S. Ct. 158, 84 L. Ed. 167, 128 A. L. R. 1437."

For the purpose of showing the rule of law enunciated by Your Honors in the *Mississippi Publishing Corporation* case above is no innovation, we quote from the case of *Anderson, et ux v. Standard Accident Insurance Company,* 36 F. Supp. 7, to indicate prior decisions on the same point:

> "In any event, the operation of no State law respecting the venue of causes can impair the jurisdiction and power of the District Courts of the United States. Goldey v. Morning News of New Haven, 1895, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517; East Tennessee, V. & G. R. Co., et al. vs. Atlanta & F. R. Co., C. C. S. D., Georgia, W. D., 1892, 49 F. 608, 15 L. R. A. 109; Butler Bros. Shoe Co. v. U. S. Rubber Co., 8 Cir., 1907, 156 F. 1; Creager v. P. F. Collier & Son Co., et al., D. C. S. D., Texas, Brownsville, 1929, 36 F. 2d 781; Junk v. R. J. Reynolds Tobacco Co., D. C. W. D., Virginia, 1938, 24 F. Supp. 716."

The brief of petitioner fails to cite one case or authority in substantiation of the contention contained in this assigned error.

Appellant's Error No. 3.

"(3) The Honorable Circuit Court of Appeals for the 5th Circuit has decided an important question of Federal law which has not been but should be settled in this Court, in holding that under Section 113 of Title 28, U. S. C. A., a defendant, citizen and resident of one Federal District of the State cannot be sued in another Federal District of the State where a co-defendant is properly suable."

What the Circuit Court of Appeals for the Fifth Circuit actually held was that when suit was brought under the diversity of citizenship provisions of the Judicial Code in the state in which the defendant was a citizen, and such suit was not brought in the district in which the defendant resided under 28 U. S. C. A. 113, that the joinder as co-defendant of a non-resident of such state who had waived the right to object to venue, did not deprive the resident defendant of his statutory right to object to improper venue.

The untenable position of petitioner is this: That if a citizen of Mississippi brings suit in the Eastern District of Louisiana against a citizen and resident of the Western District of Louisiana and a citizen and resident of Texas, and the citizen of Texas submits to the venue in the Eastern District Court, then the resident of the Western District is bound thereby and is deprived of his rights

under the Judicial Code to be sued in the Western District. Such a result is not only inconceivable within the plain intent of the statutory law, but clearly in direct conflict and disregard thereof.

The provisions of 28 U. S. C. A. 113 are simply one additional step in meeting the requirements of legal venue. The first requirement is found in 28 U. S. C. A. 112 that suit must be brought in the state of the residence of either plaintiff or defendant; if brought in the state of the residence of defendant, and the state is comprised of more than one district, then in the district in which the defendant resides. How can respondent herein be said to have waived this right and privilege granted by law through the act of a co-defendant who is in fact a non-resident of the state? We submit the question answers itself, and adversely to the contention of petitioner.

We attribute complete lack of jurisprudence (with one following exception) on this point to the fact that the provisions of the law are unambiguous and the obvious inequitable result which would come about should one person be deprived of a statutory right by the act of another.

The only case found in which such a contention has been made is that of *Beneficial Industrial Loan Corporation, et al. v. Kline, et al.*, (Iowa) 41 F. 854. Here suit was brought by citizens of Del. are in the Southern district of Iowa against two residents of the Northern district, with jurisdiction founded on diversity of citizenship. One of the defendants answered the complaint,

which was held to constitute a waiver of proper venue. The plaintiff contended such waiver was effective as to the other defendant who had seasonably objected. Pertinent syllabus of the case by which the court disposed of plaintiff's contention reads as follows:

> "A defendant's waiver of proper venue which entitled him to be sued in district of his residence does not constitute a 'waiver' by co-defendant of his right to be sued in district of his residence. Jud. Code, §51, 52; 28 U. S. C. A., §112, 113."

Appellant's Error No. 4.

> "(4) The Honorable Circuit Court of Appeals for the 5th Circuit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court in holding that the partnership-defendant and the members thereof were not properly suable outside of the district of their residence, and refusing to consider the question of an implied waiver or consent by said defendants to be sued outside of the district of their residence."

The foregoing reason for allowance of the writ is without substantiation either by citation of authority or reasonable argument. To contend that the jurisdiction and venue provisions of the Judicial Code are abrogated by reason of a citizen of one state entering into a contract of insurance with a non-resident is obviously so unsound as to require no answer. The same treatment is applicable to the contention that a resident individual may be sued in any district in his state in which he is conducting or operating a business. To so hold would be

tantamount to legislating, which is a prerogative of Congress.

APPELLANT'S BRIEF.

On page 4 of petitioner's brief it is stated:

> "The primary error in the Circuit Court of Appeals was in confusing citizenship with residence. If the terms as used in the venue statute are synonymous that Court was correct; otherwise, it was manifestly wrong. Since the law does not define 'residence' and no definition of residence can be found in any other Act of Congress, it is necessary to look to the law of the State to ascertain whether or not a person or corporation is a resident of such state. The authorities support this claim."

We think the decisions of this Honorable Court and authorities of the federal inferior courts referred to *supra* in this brief conclusively demonstrate that citizenship and residence of a corporation are synonymous within the meaning of the jurisdiction and venue provisions of the Judicial Code in diversity of citizenship suits.

Opposing counsel has cited numerous decisions of the state courts of Louisiana with respect to what constitutes residence. These decisions are manifestly inapplicable and therefore will not be answered. The courts of Louisiana may hold and the General Assembly of Louisiana may legislate, that a foreign corporation upon qualifying to do business in the state thereby becomes a citi-

zen or resident, but until Congress acts or this Honorable Court reverses jurisprudence of sixty years standing, a foreign corporation will continue to be a citizen and resident only of the state of its incorporation within the meaning of the jurisdiction and venue provisions of the Judicial Code.

To hold, as petitioner contends in this case, that the Highway Insurance Underwriters, a Texas corporation, is a resident of the Eastern District of Louisiana where the agent for service or process resides, would be equivalent to overruling the decision of this Honorable Court in the case of *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 60 S. Ct. 215, which held that a foreign corporation, following appointment of an agent, could be sued by a non-resident in any district of the state under the venue provisions. Consequently, should it be held, as petitioner contends, that suit must be instituted in the district in which the agent resides, such holding would be in conflict with the Oklahoma case *supra*.

When counsel for petitioner concede that (1) were respondents the only defendants, then proper venue would be in the Western District; (2) were the co-defendant, Highway Insurance Underwriters, the sole defendant, then proper venue would be in either district; (3) that the Western District would have proper venue had the suit been brought against both defendants in such district, then we submit petitioner has, in effect, acknowledged the contention urged of proper venue as to both

defendants in the Eastern District to be erroneous in law.

CONCLUSION.

In conclusion, we submit that:

(1) Reich Bros. Construction Co. and the individual members thereof, respondents herein, are residents and inhabitants of the Western District of Louisiana.

(2) Under the provisions of the Judicial Code, Section 52, respondents, when suit is brought against them in Louisiana, are accorded the statutory right to be sued in the district in which they reside.

(3) The question of whether the co-defendant, Highway Insurance Underwriters, is a citizen, resident or inhabitant of any state other than that in which incorporated (Texas), within the meaning of such terms as used in the Judicial Code, Sections 24, 51 and 52 for the purpose of determining venue in federal courts, is controlled entirely by federal laws, regulations and procedure and not according to the laws of the individual states.

(4) The federal law is now and has always been well established and crystallized to the effect that a corporation can be a citizen, inhabitant and resident of no other state than that in which incorporated in determining proper venue and jurisdiction of suits in federal courts.

(5) The "consent doctrine" of waiver of venue enunciated by this Honorable Court in the Neirbo decision affirmatively rejected the contention made therein that a

foreign corporation becomes a resident of the state in which it appointed an agent for process.

(6) To hold in this case that the co-defendant Texas corporation is a resident of Louisiana, for purpose of fixing venue when sued by non-resident, would have the effect of depriving citizens and residents of Louisiana of the right to sue foreign corporations in the federal courts of such state, and foreign corporations the right to remove to federal courts when sued by local residents in the state courts, since both plaintiff and defendant would be residents of Louisiana.

(7) The waiver of venue requirement by a defendant cannot have the effect of depriving a co-defendant of the right to object to improper venue which is accorded under the provisions of the Judicial Code.

We respectfully submit the decision of the Circuit Court of Appeals, Fifth Circuit, affirming the judgment of the trial court in holding that the Eastern District of Louisiana was not a court of proper venue with respect to respondents, was manifestly correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the foregoing brief has this day been served on counsel for appellant by depositing a copy thereof in the United States mail properly addressed.

Lake Charles, Louisiana, December 9., 1947.

.....,
Attorney for Respondents.

Supreme Court of the United States

No. 214

OCTOBER TERM, 1947

MRS. ABA BADGER SUTTLE, Widow, etc.

versus

REICH BROS. CONSTRUCTION CO., et al

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit

SUGGESTION OF ERROR AND PETITION FOR A REHEARING

ENGLE, LAUB, ADAMS & NORMAN
MILLER & BLOCH
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Of Counsel

HAUSER PRINTING CO., INC., NEW ORLEANS

Supreme Court of the United States

No. 214

OCTOBER TERM, 1947

MRS. ABA BADGER SUTTLE, Widow, etc.

versus

REICH BROS. CONSTRUCTION CO., et al

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit

SUGGESTION OF ERROR AND PETITION FOR A REHEARING

To the Honorable, the Supreme Court of the United States:

NOW COMES the petitioner, MRS. ABA BADGER SUTTLE, Widow, etc., through her undersigned attorneys of record, and respectfully represents that there is error on the face of the opinion and decree of this

Honorable Court rendered March 8, 1948, and that the same should be recalled and a rehearing granted herein for the following reasons:

I.

Your opinion failed to notice or decide the only issue presented to the Court, namely, that under the laws of Louisiana the corporate defendant is a resident of the Eastern District of Louisiana, and that the Federal venue statute, in respect to "residents", must be applied to persons, firms and corporations who are "residents" of the District where served.

II.

Your opinion, in effect, holds that there is a Federal common law according to which Federal common law a corporation can be a resident only of the State in which it was incorporated. This ruling is incompatible with the rule of *Eirie Railroad v. Tompkins*, and the numerous cases which followed it, which established that there is no Federal common law.

III.

The issue presented and ignored in this case, i.e., the binding effect of State law on the status of persons within the State's jurisdiction, was not before the Court in any of the cases cited in the opinion herein as authority for the rule that a corporation can be a resident of only the State of its incorporation, and therefore those cases do not justify your conclusion. Those cases were, in all likelihood, properly decided according to the laws of the States where they arose, because Louisiana seems

to be the only State which requires a foreign corporation, as a condition of the right to do business, to consent that it will be a resident of Louisiana for "all purposes of jurisdiction and venue."

IV.

There is error in the statement that only Congress may change the asserted rule of law that a corporation can be a resident of only one State, because of the cases decided over a long period of time. If this is true then the *Eirie Railroad* case was wrongly decided, because it upset a line of cases, unvaried for nearly a century, without the intervention of Congress. This conclusion is also erroneous because Congress has no Constitutional authority to declare who are or who are not residents of a State. It is an unprecedented thing for a Court to hold that a State may not decide for itself who are and who are not residents therein, which is the plain result of a ruling that when the venue statute refers to a "resident" it means something different from a "resident" as defined by the applicable local law. May we repeat that the venue statute does not define a resident.

V.

Lastly, your opinion is erroneous because it will not be a precedent for the decision of the same point if it arises again. If another State requires a foreign corporation to accept the status of residency as a condition for doing business there this same case may arise again and, since there has been no reference whatever made in your opinion to the established status of residency of the corporate defendant under the State law, you will be called on again to decide the matter.

WHEREFORE, petitioner respectfully prays that the opinion and decree rendered herein be recalled and rescinded and a rehearing granted herein.

Respectfully submitted,

ENGLE, LAUB, ADAMS & NORMAN
MILLER & BLOCH

Attorneys for Petitioner

JOHN D. MILLER
Of Counsel

SUPREME COURT OF THE UNITED STATES

No. 214.—October Term, 1947.

Mrs. Aba Badger Suttle, Widow of John G. Suttle, Individually and as Administratrix of the Estate of John G. Suttle, Deceased, etc., Petitioner,
v.
Reich Bros. Construction Co. et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[March 8, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

We granted certiorari in this case to consider a question arising under the federal venue statutes. Petitioner, a resident and citizen of the State of Mississippi, brought a negligence action based on diversity of citizenship in the District Court for the Eastern District of Louisiana. The defendants in that suit were the respondents Reich Bros. Construction Company, a partnership, and its individual members, residents of the Western District of Louisiana, and Highways Insurance Underwriters, a Texas Corporation which had qualified to do business in Louisiana pursuant to a statute of that State.

Section 51 of the Judicial Code provides that ". . . where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."[1] This general provision is qualified by § 52 of the Judicial Code, which states that ". . . if there are two or more defendants, residing in dif-

[1] Act of March 3, 1887, 24 Stat. 552, as corrected by Act of August 13, 1888, 25 Stat. 433, 28 U. S. C. § 112.

ferent districts of the State, . . . [suit] may be brought in either district, . . ."[2]

It is conceded by the parties that the Texas corporation, Highways Insurance, having qualified to do business in Louisiana is amenable to suit in the federal courts for either the Eastern or Western District of that State.[3] The critical issue of the case is whether Highways Insurance may be regarded as a "resident" of the Eastern District of Louisiana within the meaning of § 52 of the Judicial Code, so that respondents Reich Bros. Construction Company and its individual members may properly be sued as co-defendants of the corporation in the Eastern District of Louisiana, despite the fact that respondents are residents of the Western District of that State.

The respondents moved to dismiss the action on the ground of improper venue. The District Court granted the motion, and the suit was dismissed as to respondents, leaving the action pending against the corporation. The Circuit Court of Appeals affirmed.[4]

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[2] R. S. § 740, 36 Stat. 1101, 28 U. S. C. § 113. The section in its entirety follows: "When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall endorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."

[3] See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 (1939); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1940).

[4] 161 F. 2d 289 (1947).

The issue we are called upon to resolve is a narrow one. We are not confronted with the abstract question whether, under any circumstances or for any purposes, a foreign corporation may properly be regarded as acquiring "residence" in a State other than that in which it was incorporated. Nor is our problem that of discovering whether, under State law, a qualified foreign corporation is treated as a "resident" of the State in which it is doing business.[5] The sole issue of this case relates to the construction of the term "residence," appearing in the particular federal venue statutes under consideration, as it applies to a foreign corporation.

The "residence" of a corporation, within the meaning of these statutes has frequently been the subject of consideration by this Court for a period of over half a century. Shortly after Congress had enacted § 51 of the Judicial Code in substantially its present form, this Court declared that the "residence" of a corporation, within the meaning of the venue statutes, is only in "the State and district in which it has been incorporated."[6] Thus, in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 450 (1892), it was said: "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it."

For almost sixty years, in an unbroken line of decisions, this Court has applied the same construction.[7] That view

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[5] See *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 443–444 (1946); *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 175 (1939); *Ex parte Schollenberger*, 96 U. S. 369, 377 (1878).

[6] *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449 (1892).

[7] *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 205 (1892); *In re Keasbey and Mattison Co.*, 160 U. S. 221, 229 (1895); *Macon Gro-*

was reaffirmed as recently as 1946 in the opinion of the Court in *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 441.[8]

Congress has revealed a similar understanding of the term "residence" when enacting special venue statutes in situations in which it was intended that, at the election of the plaintiff, a corporation should become amenable to suit either in the State of incorporation or in States in which it is carrying on corporate activities. In those statutes, Congress has provided that the venue of such suits should be located not only in the district in which the corporation is a "resident" or an "inhabitant," but also in districts in which it may be "found," "transacts business," or has an agent to receive service of process.[9]

Nor does the decision of this Court in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 (1939), re-

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cery Co. v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 509 (1910); *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, 367 (1910); *Male* v. *Atchison, Topeka & Santa Fe R. Co.*, 240 U. S. 97, 102 (1916); *General Investment Co.* v. *Lake Shore & Michigan Southern R. Co.*, 260 U. S. 261, 274–279 (1922); *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 270 U. S. 363, 366 (1926); *Luckett* v. *Delpark, Inc.*, 270 U. S. 496, 499 (1926); *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U. S. 208, 211 (1927). And see *In re Hohorst*, 150 U. S. 653, 662 (1893); *Galveston, Harrisburg and San Antonio R. Co.* v. *Gonzales*, 151 U. S. 496, 503–504, 506 (1894).

[8] Section 52 of the Judicial Code qualifies or provides an exception to the general provisions of § 51. There would be no basis for the suggestion that Congress intended to attribute a meaning to the term "residence" in § 51 different from that in § 52.

[9] See, *e. g.*, § 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." See also § 48 of the Judicial Code, 29 Stat. 695, 28 U. S. C. § 109; § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15; 36 Stat. 291, 45 U. S. C. § 56.

quire that the term "residence" be construed differently. In that case, the plaintiffs, citizens and residents of New Jersey, brought suit based on diversity of citizenship against the defendant, a Delaware corporation, in the Southern District of New York. This Court held that the venue requirements in the federal courts may be waived and that the defendant, since it had appointed an agent to receive service of process in New York pursuant to a statute of that State, might not insist upon suit being brought in Delaware, the State of its incorporation, or in New Jersey, the State in which plaintiffs resided. But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in § 51 of the Judicial Code, the defendant corporation thereby acquired "residence" in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit "was not brought 'in the district of the residence of either the plaintiff or the defendant.'" [10]

For the reasons stated, we hold that the Highway Insurance Underwriters, a Texas corporation and respondents' co-defendant, is not a resident of the Eastern District of Louisiana in which suit was brought, within the meaning of § 52 of the Judicial Code. While, concededly, the Texas corporation has made itself amenable to suit in the federal courts of either district in Louisiana by qualifying to do business in that State, such action on the part of the corporation may in no way be regarded as a waiver by respondents of the privileges conferred upon them by the venue statutes. Section 51 in general terms provides that a diversity suit of the sort involved here must be brought either in the district in which the plaintiff resides or in which the defendant resides. This suit, brought in the Eastern District of Louisiana, satisfies

[10] *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167 (1939).

neither requirement. Respondents' privilege conferred by § 51 can be defeated either by waiver on the part of respondents or, as provided in § 52, by petitioner bringing suit against respondents and others in a district in Louisiana in which one of the co-defendants has acquired residence but in which respondents do not reside. Neither circumstance is present here. Respondents made timely assertion of their privilege and may not be deemed to have waived their venue objections. As we have held, their co-defendant, Highway Insurance Underwriters, may not be regarded as a resident of the Eastern District of Louisiana in which suit was brought. It follows, therefore, that respondents' objections to venue were well taken, and that, in sustaining those objections, the District Court and the Circuit Court of Appeals reached a result in accord with the requirements of the federal venue statutes as consistently construed by this Court. If those requirements are to be altered, it is a task which must be undertaken by Congress.

Affirmed.